

Nova Law Review

Volume 12, Issue 1

1987

Article 2

CUNY Law School: Outside Perspectives and Reflections

Judith Kleinberg*

Mark Barnes†

*

†

Copyright ©1987 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

CUNY Law School: Outside Perspectives and Reflections

Judith Kleinberg and Mark Barnes

Abstract

Under the influences of legal realism and its modern variants in linguistic and psychoanalytic of law, critical legal studies, and social science approaches to law, significant departures from the Langdell's model curriculum have become common: first year courses on legal method or legal process; near-abandonment of the socratic method by some teachers and at some schools (Yale, for example); the use of non-case teaching materials in upper-level seminars; and extensive clinical programs.

KEYWORDS: legal, law, school

CUNY Law School: Outside Perspectives and Reflections

Judith Kleinberg and Mark Barnes *

Under the influences of legal realism and its modern variants in linguistic and psychoanalytic analyses of law, critical legal studies, and social science approaches to law, significant departures from the Langdell's model curriculum¹ have become common: first year courses on legal method or legal process; near-abandonment of the socratic method by some teachers and at some schools (Yale, for example); the use of non-case teaching materials in upper-level seminars; and extensive clinical programs.² For the past four years, one radically new, ambitious and comprehensively designed departure from the Langdellian model has been under way at City University of New York Law School at Queens College ("CUNY").

CUNY, which represents one of the most significant efforts to revolutionize traditional legal education, has been reported to be facing pressure to make its educational program more traditional.³ CUNY

* Mark Barnes and Judith Kleinberg are Associates in Law at Columbia University School of Law, New York, New York. This article grew out of a joint seminar presentation given on December 3, 1986 before the Seminar on Legal Education. We would like to thank the members of that seminar and its leaders, Professors Arthur Murphy and Richard Briffault, for their comments and suggestions. We would also like to thank the many people at CUNY Law School we talked with during our visits to the school. Special thanks to Professors Howard Lesnick, Sue Bryant, Celina Romany, Carlton Clark, Nan Feyler, Richard Boldt, and the students in Richard Boldt's fall, 1986 House.

Mark Barnes was primarily responsible for Sections I, II, V and VII. Judith Kleinberg was primarily responsible for Sections III, IV, VI and VIII.

1. One of the clearest statements of Langdell's "scientific jurisprudence" may be found in the preface to his contracts casebook. C. LANGDELL, *A SELECTION OF CASES OF THE LAW OF CONTRACTS* (1870).

2. For a discussion of the influence of these intellectual movements on the modern law school curriculum, see Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968) and R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

3. Adams, *New CUNY Dean to Face Pressure To Move School Into the Mainstream*, NAT'L L.J., June 8, 1987, at 4, col. 3. According to Adams' account, the effort to change the CUNY curriculum, in part, is prompted by the resignation of the founding Dean, Charles Halpern, and the appointment of W. Haywood Burns, who is serving

opened its doors in the fall of 1983 and graduated its first class of law students in the summer of 1986. In the near future, the administration, faculty and student body at CUNY will have to decide whether CUNY should begin to adopt the ways of more traditional law schools, or continue its present course of rejecting traditional legal education.

During the fall of 1986, while preparing a report on curricular innovations at CUNY for a faculty and graduate student seminar at Columbia Law School, we visited the school numerous times and talked to students, faculty, staff and administrators. All were forthcoming about their school and its peculiar place within American legal education. Members of the CUNY community also were keenly interested in what we thought of the school based on our more traditional backgrounds.

The purpose of this article is to convey our impressions and describe the present educational programs at CUNY. In addition, this article represents an attempt to evaluate the successes and shortcomings of the CUNY curriculum in order to aid educators in their decisions to adopt or reject certain aspects of the CUNY methodology, and to indicate how legal education can be more responsive to modern notions of law and legal practice.

presently as Vice Provost and Dean for Urban and Legal Problems at City College of New York. Dean Burns also has served as an adjunct professor at CUNY and will assume the role as Dean at the beginning of the 1987-88 academic school year. In Adams' view, much of the pressure to reconsider aspects of the CUNY educational program is due to the performance of CUNY graduates on the bar exam. *Id.*, at 4, col. 4. See *infra* note 69 and accompanying text for a discussion of bar passage rate.

CUNY Professor Rhonda Copelon, however, has disputed the accuracy of Adams' report. Copelon, *An Unclear View of the CUNY Law School*, NAT'L L.J., July 6, 1987, at 12, col. 4.

There are not, as he asserts, "enormous pressures to move into the mainstream of legal education." To the contrary, our program, which will enter its fifth year in the fall, enjoys strong support from within the City University and the world of legal education precisely because it is not mainstream. It has earned the respect, and dispelled the doubts, of legal educators and representatives of the American Bar Association; and aspects of our program are being used or emulated in other law schools. Lawyers who employ our students report enthusiastically on their skill, initiative and acumen, all of which flow from the life experience our student body brings to education, as well as our non-traditional approach to learning.

I. History and Aims of the School

Joseph Murphy, who had been president of Queens College in the 1970s, had been one of the first to conceive of establishing a law school in New York City affiliated with the City University system and dedicated to public interest law. The proposal gathered support from various political figures in Queens, but all plans were put on hold with the New York financial crisis of the late 1970s. After Murphy returned to New York in 1982 as Chancellor of CUNY, plans for the law school were revived. Charles Halpern, John Farago and Howard Lesnick were hired and began to organize the school and plan its curriculum. In the fall of 1983, CUNY Law School opened at a public school in Queens with 140 students and 8 faculty members. By 1986, that first class had graduated and the school had moved into a newly renovated and spacious building.⁴ The school now has approximately 450 students and 35 full-time faculty members.

The general aims of the school and its curriculum are four-fold.⁵ First, as a public institution supported by the State and City of New York, the school seeks to serve the public interest by requiring clinical internships, by encouraging its graduates to enter public-interest legal practice, and by emphasizing in its curriculum "a commitment to justice, fairness and equality."⁶ Second, the educational approach of the school is deeply humanistic, with an emphasis on moral and personal development of the student, along with intellectual development. The goal is to empower students to make informed choices about careers and lives, with some knowledge of the implications of these choices. Third, the school strives to function as one community, composed of various elements but with shared goals and purposes, seeking consensus as much as possible and emphasizing collaborative effort rather than competition. Fourth, the school is trying to reformulate legal education,

4. In a recent article, Paul Goldberger praised the renovated building for the integration of its new design with CUNY's curricular needs. N.Y. TIMES, June 7, 1987, SH (Arts and Leisure), at 39.

5. Three law review articles discuss in detail the aims and goals of legal education at CUNY and provide important insights into the curriculum. Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986); Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549 (1986); and Lesnick, *The Integration of Community and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633 (1986).

6. Halpern, *supra* note 6 at 555.

in opposition to traditional courses, hierarchies, socratic and doctrinal approaches to teaching and the traditionally limited uses of clinical education.

These broadly-conceived objectives are manifested, as one might expect, in the many different and disparate workings of the school: in the curriculum; in faculty selection and teaching; in the grading and evaluation of students; in admissions and placement; in student-faculty relationships; and in the role of the support staff. One of the most important expressions of these goals is the method of governance of the school itself, which differs widely from that of other law and professional schools and which is highly reflective of the broad objectives of the school. Almost all of the important policy and decision making at CUNY is done by various committees, working by consensus. Membership on most of these committees is voluntary and may include students, support staff and administrators, as well as faculty. The resolutions of the committees go before the Assembly of the school which is composed of faculty, administrators, twelve student representatives and five representatives of the school's staff and which also works by consensus. This governance plan is reminiscent of a recent controversial proposal by Duncan Kennedy to include all groups, including support staff and students, in the administration of a law school.⁷ However, far from the prospect (to some in American legal education, horrifying) of someone other than faculty making curricular decisions, the CUNY experience to date has been positive. In any case, student and staff representation in the Assembly is limited, and in discussion, groups tend to defer to each other's areas of expertise.

The most significant problem with this structure has been that it is extremely time-consuming. Various people at the school remarked to us that discussions sometimes take hours even to settle minor points, both in the Assembly and in the committees. However, those at CUNY seem sanguine about the costs of what seem to some outsiders as a process of "reinventing the wheel." At CUNY, this system of governance helps to foster a sense of community and to provide an opportunity for all to observe and participate in politics, power, and group rule-making. Thus, the political structure recreates on a smaller level the subjects — law and law-making — to which the school is devoted and allows for continuing experimentation with the school's life in its role as an ongoing educational laboratory.

7. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 610-15 (1982).

Although the results include inefficiency, the process does produce a sense of community in the school — a sense that was clear to us in the attitude of almost everyone with whom we spoke during our visits to CUNY. The students and staff, for example, talk and act as if they have a proprietary interest in the school and its physical plant. Perhaps the most tangible example of this community spirit one may offer is the community-wide effort at CUNY to provide an on-site day care center. Members of all the different groups at the school, including students, have united in fund-raising drives for the day care program. The goal is a practical one: to provide quality child care at low cost for anyone in the school who needs it. But the goal also is to empower a whole segment of people with small children, a group that includes many women, and to give them access to jobs or higher education that they otherwise might be denied.

II. Curriculum: An Overview

In its new curriculum, CUNY has departed notably from that of more traditional law schools. In implementing the school's broad goals, the planners of the curriculum at CUNY have attempted to remedy what they have seen as defects and inadequacies in most current legal education. One of these perceived inadequacies is the familiar course divisions of first year legal education into torts, contracts, civil procedure, property, criminal law and, in some schools, constitutional law. Partially reflecting the criticisms offered by the critical legal studies movement,⁸ the curriculum planners at CUNY have disputed the use of these courses as the "building blocks" of law and the legal curriculum.

CUNY also has criticized as outdated the widespread emphasis on private law, private litigation and market transactions. In response to these perceived deficiencies the curriculum planners have devised a system of broadly defined and cross-categorical courses for the first and second year students. These courses are taught collaboratively by faculty with related specialties and cover many public law topics in-

8. *Id.* See Gordon, "Of Law and the River" and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985) (on moral and humanistic goals in legal education); and Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1984) (on the ideological and philosophical assumptions of the public law/private law distinction). See also Macdonald, *Curricular Development in the 1980s: A Perspective*, 32 J. LEGAL EDUC. 569, 570-4 (1982).

cluding constitutional law, administrative law and antidiscrimination law.⁹ There is enhanced emphasis in all instruction on ethics in the law, methods of alternate dispute resolution and administrative agency procedures. There is also extensive use even in the first year curriculum of law journal and legal periodical articles to provide cross-disciplinary and theoretical perspectives on legal doctrines. Most importantly, the classes are meant to present legal problems to the law student much as an attorney in practice would encounter them. This is accomplished by the use of "simulations" — detailed legal problems and exercises around which the CUNY curriculum is organized, and which represent a kind of union of clinical with doctrinal, course-specific legal education.¹⁰

The CUNY curriculum is highly responsive to the school's broad goal of educating students "humanistically" and encouraging the development of humane values. One must look hard at CUNY to find the type of hierarchy and elitism usually associated with being students and teachers in American law schools. First and second year classes are organized into "Houses" of twenty students each, led by teachers, who are regarded as "senior attorneys" in the House law firm. Because of this organization, the student-faculty ratio is much more favorable than in other law schools; students have easy daily access to faculty whose offices are only steps away from the students they teach. Students address teachers by their first names, and are not compelled to participate in large class discussions. There are few final exams. Faculty evaluation of students' work is deemphasized. Students are encouraged to work and study in groups and to complete exercises through collaboration.

9. CUNY educators believe that this method of course organization is preferable to the more traditional course divisions at other schools:

Attorneys in practice are seldom presented with a legal problem neatly compartmentalized into analytically distinct subject headings as do traditional first-year courses; hence, a curriculum that brings together the subjects of study is at once intellectually preferable and better adapted to educate attorneys to be able to address the many-sided problems with which they must deal on a daily basis.

The unusually broad scope of our courses facilitate teaching of related subjects in a single course in ways that are obstructed by the traditional curriculum. The compartmentalization of Contracts from Property, for example, or of Torts from Criminal Law, impeded learning as much as it facilitates it.

Halpern, *supra* note 6 at 556-57.

10. See *infra* Sections III and IV for detailed discussions of the House system and the simulations.

The suspicion of hierarchy and centralization extends even to the use and placement of library resources. There are small law libraries and LEXIS terminals in each of the Houses so that students need not always resort to the large library.

The House system, with its simulated legal exercises, is the primary vehicle for instructing students at CUNY. In their first, second and third semesters, students are members of one of the Houses and participate in the House activities and simulated legal problems. Along with the House exercises and activities, first semester students are enrolled in four courses that in other law schools would be regarded as cross-disciplinary: Adjudication and Alternatives to Adjudication; Liberty, Equality and Due Process; Work of a Lawyer; and Law and a Market Economy.¹¹ The curricula in these four courses is geared to parallel roughly the subject matter of simultaneous House simulations.¹² These courses are team-taught by two or three faculty members, are attended by the whole first year class (roughly 175 people), and are held in a large lecture hall — the only such lecture hall at the school. Although attendance at these classes is expected, some students choose not to attend. Instead, these students presumably do the readings for the courses — without which at least some of the House simulations could not be understood. The sessions of these classes, which meet for two or three hours per week, are markedly different in atmosphere and procedure from large classes in other law schools. Teachers tend to lecture based on assigned readings, not using the traditional socratic method but rather seeking student volunteers as students wander around the room sometimes talking to one another in low voices. The lectures we attended included little close case analysis, instead treating broad themes in the assigned groups of cases and law review articles. All faculty who teach the first year courses are also the leaders of the first year Houses. Similarly, second year courses are taught by the leaders of the second year Houses, so that the faculty at CUNY is largely organized into three groups corresponding to the three years of the curriculum. A faculty member is thus assigned to one of the three years, and does most of her teaching to students in that

11. For a more detailed description of the first year course in *Law and a Market Economy*, see Khosla and Williams, *Economies of Mind: A Collaborative Reflection*, 10 NOVA L.J. 619 (1986). Courses are described in detail in the annual announcement of the school. CUNY LAW SCHOOL AT QUEENS COLLEGE 9-17 (1986-87).

12. See *infra* notes 31-47 and accompanying text for a detailed account of how the simulations are integrated with the curricula of the courses.

year of law school.

Among the first semester courses, *Adjudication and Alternatives* covers the structure and workings of the judicial system and includes much of what we think of as civil procedure. *Liberty, Equality and Due Process* resembles a constitutional law course focusing on the First Amendment and the Equal Protection clause, as well as on significant events in American legal history, such as black slavery and its aftermath. In *Work of a Lawyer*, students acquire basic legal research and writing skills and practice oral advocacy, counseling and negotiation. The course thus appears to be a combination of a legal methods and trial advocacy course. *Work of a Laywer* extends into the second semester. *Law and a Market Economy* focuses on the role of law in private economic transactions. In the fall, this course covers topics in the law of property, torts and contracts. It continues in the spring semester, covering selected topics in the law of business organizations (corporations and partnerships) and some labor law.

In the spring semester of the first year, House simulations continue. Second semester students also take Responsibility for Injurious Conduct, which covers the various bases for criminal and tortious liability, Civil and Criminal Procedure, and Law and Family Relations, which deals with the law's relationship to family life and emphasizes the numerous ways in which law touches and controls private lives of citizens.

During the third semester, the House simulations continue with extensive practice in oral advocacy and client counseling. Third-semester students also take three courses: *Raising and Spending Public Money*, covering the raising and spending of government revenue and public benefit programs; *Public Institutions and the Law*, closely resembling an administrative law class; and *Lawyering and the Public Interest*, which focuses on public interest law practice and includes topics from evidence, procedure and advocacy. The more general goal of all courses in the third semester is to prepare students for their required clinical internship in the fourth semester, for which they may elect one of three concentrations: Criminal Justice, Housing, or Equality. The students work throughout the New York area in public interest placements arranged by the second year faculty, three or four of whom, along with the practitioners, supervise student work in each of the areas.¹³ Simultaneously, at the law school students attend classes cover-

13. These student placements have included such organizations as the American Civil Liberties Union, Center for Constitutional Rights, NAACP Legal Defense Fund,

ing the subject matter of their elective. They also attend weekly small group meetings to discuss and reflect on their internship experiences.

Because of the novel course divisions, the simulations and the public interest internships, the first and second year curricula at CUNY differ markedly from those of most other schools. The third year curriculum, however, is the least well developed and most traditional part of the CUNY program. In their third year, students may enroll in elective courses that closely resemble basic courses at other law schools: for example, Constitutional Law, Commercial Transactions, Corporations, Family Law, Labor Law and Real Property, among others. Third year students also enroll either in elective clinical programs or in "lawyering seminars," which focus on specific legal areas but which touch on issues of legal practice and career planning. As a requirement for graduation, students must take and pass a series of "mastery exams." First year exams cover criminal law and torts, and a second year exam is administered in evidence. Third year students pass a series of exams that cover other traditional law school and bar exam subjects. For these exams, students study detailed outlines provided by the faculty, and may take the exams as often as necessary in order to pass them. The third year curriculum seems to be designed to cover gaps in students' knowledge and to help to prepare them for the bar examinations. Several faculty members also indicated that the third year curriculum will receive more attention in the next few years and likely will be changed substantially.

III. The House System

Through a participatory educational program, the founders of CUNY are attempting to create an atmosphere that encourages students to take responsibility for their own choice, and, in turn, will foster the ability of CUNY's graduates "to practice law in a socially useful manner."¹⁴ The House system is the primary feature of CUNY's par-

New York City and New York State Human Rights Commissions, legal services organizations, and small private law firms.

14. Halpern, *supra* note 6 at 555. In the prologue to the most recent CUNY catalog, Dean Halpern explains the relationship between the goal of encouraging students to take responsibility for their choices to the goal of building a law school committed to serving the public interest:

My experience as a lawyer and a law teacher has confirmed that it is essential for law students to develop clear goals in becoming lawyers. It also suggests the rewards available to lawyers when they are doing work in

ticipatory educational model and is intended to ensure student involvement in the educational and administrative processes at the school. The system serves four purposes: one, to provide students with a convenient place to study and work; two, to simulate a law office environment; three, to create an egalitarian political community; and finally, to provide students with the means to make decisions about their own education. The House system is the core of the CUNY educational program, and perhaps the most innovative aspect of the curriculum.

Every first and second year student is affiliated with a House. The House is the area in which approximately twenty students work and spend the vast majority of their time at school. Each House has its own assigned "House counselor," a faculty member.¹⁵ In order to encourage students to maintain a strong affiliation with their Houses, CUNY provides each member of every House with a desk, bookshelf and a locked area for personal belongings. Each pair of Houses shares a small classroom with videotape equipment, a small library, word processing facilities, a photocopying machine and a secretarial office.

CUNY's founders created each House to simulate a law office.¹⁶ In the House, students do a significant amount of their work in the "roles" of attorneys, clients and judges. A large proportion of their simulation work requires students to "go into role" and to practice their interviewing, negotiating and counseling skills.¹⁷

which they believe. This Law School encourages students to clarify the reasons they are studying law, and assists them in building characters that use their professional skills to serve the values to which they are committed.

CUNY LAW SCHOOL AT QUEENS COLLEGE 6 (1986-87).

15. According to John Farago, who is both a founder and a faculty member of CUNY Law School, a House counselor's fundamental responsibility is to ensure that students maintain a focus on "accepting responsibility rather than seeking power . . . recognizing that the latter (to the extent it is legitimate) will emerge from it." Farago, *supra* note 6 at 481.

16. Through the House system CUNY's founders have attempted to create an atmosphere that simulates a law office, both by providing students with a permanent work place and by requiring students to spend the vast amount of their time participating in scheduled activities. Classes constitute only one of the many activities that students must attend during a given day. See Appendix A for a diagram of a typical House and Appendix B for a typical schedule for a first year student.

17. According to the CUNY faculty, students function "in role" when they perform those tasks a lawyer, client, witness, judge or adversary performs in the "real world." See *infra* notes 31-53 and accompanying text for a detailed account of the use of simulations at CUNY and their integration with the substantive courses.

In addition to providing students with a place to work, CUNY's creators intended that each House would constitute a political unit. The administration and faculty believe that the political experience, which the House system guarantees, encourages students as members of a political community to engage in reflective and responsive learning. Upon formation, the members of every House are required to institute their own political processes and create their own rules governing house-keeping and work. The rationale behind these requirements is that CUNY students will both learn and experience first-hand "society formation, rule formation, regulation and creation of a sense of community that infuses law with reasoning."¹⁸

CUNY's founders contend that the House system was designed both to provide students with the opportunity to learn about political practice and theory and to eradicate the hierarchy characteristic of traditional law schools. The administration hopes to accomplish this particular goal by encouraging cooperative work within each House, eliminating the traditional grading system and providing each House with the opportunity to have an impact on the administration of the entire school.¹⁹ Each House designates a person from its political community to serve on a school-wide panel. This panel then selects those students who serve on the Assembly that governs the law school community. Every House also appoints individual students to be on committees that regulate critical aspects of community life.

During weekly "House meetings," each student community engages in its political decision-making processes. CUNY educators believe that these meetings are an integral part of the House system because they provide a forum for effectuating the goals of "community

18. Farago, *supra* note 6 at 482. Farago further describes the benefits associated with community life at CUNY. He states that the House system provides students with the opportunity to engage "in the sort of community and governance building that can inform at a deeper theoretical level an understanding of the complexities, tensions and outcomes of society." *Id.*

19. John Farago explains that by encouraging students to do collaborative work, the CUNY model will alter the traditional hierarchical model normally associated with law school education. Farago, *supra* note 6 at 500. There is no doubt that the House system and the use of simulations as the primary educational tool require students at CUNY to do a large percentage of their work in teams or pairs. However, a few students complained that working with other students was unsatisfactory because collaboration often resulted in an inefficient use of their time. Moreover, some students commented that they still felt a sense of competition despite the elimination of the traditional grading system.

and governance building.”²⁰ We had the opportunity to observe such a meeting during one of our visits in the fall of 1986.²¹ A review of the issues discussed at the meeting might help to indicate whether the House system exposes CUNY students to issues relating to political theory and to questions concerning the “complexities, tensions and outcomes of society.”²²

The House members began the meeting by formulating an agenda and appointing a person to act as chair. The first item on the agenda was the “student association.” The issue of concern was the election of student representatives to the Assembly. After being recognized, one student reported that he had filed a “complaint” on behalf of the entire House. In this complaint, he alleged that the election of one student to the general assembly had violated basic notions of due process. In response, members of the House agreed that they should draft a letter in protest of the election of this student.

The establishment of a day care center at the law school was the second issue on the agenda. The House had run a lunch in an effort to raise funds for the center. A rather heated discussion took place relating to the operation of the lunch. Several women contended that the men had failed to assist them serve customers during the sale. In response, the men asserted that they had been rebuffed and told to sit down when they had volunteered to help.

The third item on the agenda was the alleged “rudeness” of students during lectures given at the House. More specifically, a student objected to the use of computers during a faculty lecture. The meeting then digressed to a debate over what many students labeled the “general rudeness factor.” Several House members commented on the tendency of certain students to be disruptive when they disliked what a lecturer was saying. Others complained that it was rude to leave the House during a lecture to get something to eat or drink. However, several students defended their right to come and go as they pleased.

The library was the fourth issue designated for discussion. A stu-

20. *Id.* at 482.

21. The House we visited was composed of first year students. The faculty member assigned to the House was Professor Richard Boldt. In an effort to acquire the best understanding of the CUNY legal education, we concentrated upon attending these particular students’ classes and examining their assignments. Because our time was limited, we felt that we could best provide an overview of important aspects of the CUNY methodology, such as the House system and the use of simulations, by observing in some depth the experience of the members of this specific House.

22. *Supra* note 19.

1987]

CUNY: Outside Perspectives

13

dent who was a member of the library committee led the initial part of this discussion. However, before exploring the substantive issues relating to the management of the library, the House counselor interjected a comment about the proper role of a political representative. He posed the question whether it is appropriate for a legislative representative to represent his or her own views, or in the alternative, to assert the beliefs of the constituents.

After a short debate about the proper role of a political representative, the student on the library committee identified the problems associated with library management. The issues she identified included the problem of thefts in the library and the implementation of a rule regulating the use of the library by study groups. The House members then discussed the possibility of precluding altogether the use of the library by study groups. There was no consensus about the latter issue. Some students agreed that the library committee should ban study groups entirely from the library, while others felt that the committee should not impose any limitations upon these groups. One student suggested as a possible compromise that the school enact a rule relegating study groups to certain designated sections of the library or that the administration extend the library's hours.

In the midst of the discussions about library management there was an extensive debate about the tendency of second and third year students to use the House library. A few students were quite adamant about excluding nonmembers from the House or its library. The latter students argued that the use of the House by nonmembers constituted an invasion of their "personal space." In response, other members of the House pointed out that the school is premised upon a notion of community thereby making a policy of exclusion "contradictory." These particular students further argued that prohibiting others from using the House would isolate the House and limit their experience as members of the larger CUNY community. In support of this position, one particular student urged the House to reject "the separate but equal doctrine." In the midst of this discussion, the House counselor interjected a reference to materials the students had studied in their Law and a Market Economy course. He analogized the debate over the use of the House by nonmembers to the treatment of Native Americans by the settlers. He reminded the class that the settlers had coopted the Native American's property as soon as they landed on the North American continent. More specifically, one House counselor raised this point in order to compare the failure of Native Americans to conceive of the notion of private property to the belief of several House members

that the exclusion of other members of the community from use of the House's general resources was inappropriate.

Without a resolution on the question whether second and third year students could use the House or its library,²³ the House turned to the fifth item on the agenda which was Richard Boldt's tenure as House counselor. Currently, it is the practice of the CUNY administration to change those House counselors in charge of first year students at the beginning of the second semester. The theory behind this rule is that students should be provided with the opportunity to be evaluated by more than one member of the faculty. One student pointed out that unless the House took formal action in opposition to this rule, "precedent" would reign and the House would lose its present counselor. Rather than attempting to resolve this issue in the presence of the House counselor, the students agreed to put off their discussion until "student initiated time."²⁴ In the interim, one student insisted upon preparing a draft letter in support of retaining their House counselor for another semester.

The final item on the agenda was faculty evaluation of students. Instead of using a traditional grading system, each House counselor is responsible for evaluating every member of the House on the basis of the student's work over the entire semester. At the end of the semester the House counselor completes a CUNY evaluation form for each student.²⁵ At issue during the House meeting was the validity of the form that the CUNY faculty currently uses. The student who raised this issue asked his Housemates for criticism of this form. He further informed his classmates that unless they suggested changes the faculty would continue to use the same evaluation sheet. No one proposed any changes at this particular House meeting. Because the House had discussed all of the items on the agenda, the chair then ended the meeting.

Perhaps the most striking feature of the House meeting is its dis-

23. The House also failed to come to any consensus about the use of the library by study groups. However, before proceeding to the next item on the agenda, the student representative of the library committee stated she would report the various comments and suggestions to her committee.

24. "Student initiated time" takes place once a week for approximately one hour. Unlike the House meeting, the counselor does not attend student initiated time. However, House members discuss problems associated with living and working in House during "student initiated time," just as they do in the House meetings.

25. See *infra* Section VII for a discussion of the CUNY evaluation system. See Appendix C for a sample evaluation form used at CUNY.

similarity to any aspect of traditional law school education. It was clear from observing the House meeting that CUNY founders have successfully created a sense of community through the House system and that this community is more egalitarian than the political structure characteristic of most law schools.²⁶ Unlike traditional law schools, members of the faculty appear to have a very close rapport with the vast majority of the student body. Equally positive is the tremendous amount of individual attention students receive from their House counselors. In fact, several faculty members indicated that they often seem to act as personal counselors, listening to students and offering advice even on personal matters.

Although CUNY successfully appears to have created a vital sense of community through their implementation of the House system, it is not clear that the House experience necessarily contributes either to an understanding of "society" and "rule formulation," or to the relationship of these concepts to our legal system.²⁷ Unfortunately, very little was accomplished by the students at the House meeting we attended. Instead, the House members spent the majority of their time discussing

26. We had the opportunity to speak with two white male students who took issue with this conclusion. They contended that the system favors minorities and females and discriminates against white males. They further asserted that the CUNY administration was intolerant of any suggestion supportive or reminiscent of methods used by traditional law schools. For example, they stated that CUNY "automatically rejected" a suggestion for the establishment of a law review or journal at CUNY, because such a proposal was "elitist" and would "credential ten percent of the class at the expense of the rest." Finally, these students contended that the student body as a whole is adverse to any ideas that appear to be in conflict with those interests associated with women and minority rights.

CUNY faculty members reported, however, that the idea of a law review was not rejected. Instead, they stated that the failure to establish a law review is largely due to a lack of student interest. There recently has been some student interest at CUNY in forming a "video law review," which would utilize videotapes to record lectures and workshops on legal topics.

27. It is difficult to argue, of course, that the House is analogous to the political institutions that characterize our society. The students did not discuss at length legal concepts or political theory during the House meeting. Although the House counselor interjected comments relating to political theory and "rule formation," the majority of the discussion concerned housekeeping issues. Moreover, when students talked about legal concepts such as "due process" and "separate but equal," they did not give the impression that they really understood the meaning or applicability of these principles. See *supra* note 15 and accompanying text for a discussion of the perceived political and community benefits associated with the House system.

issues that were not on the agenda.²⁸ Although some benefit may arise from the mere airing of issues, on the whole, the students did not engage in "rule" making because of their failure to pose any concrete resolutions to the problems raised by the House agenda.²⁹ Although there were extensive and lengthy discussions about "rudeness" and sharing House resources, the students were unable to suggest solutions to these problems. Nor was there sufficient community spirit to create a consensus in favor of sharing House resources with other students in the community.

IV. The Simulation: An Educational Methodology

CUNY educators view the House system both as the fundamental means of ensuring the existence of an egalitarian political structure and as a forum in which students may participate in their own legal education: "It is through the House [and the simulations] that [CUNY] mean[s] to achieve the integration of clinical methods and a lawyering focus with the substantive, theoretical or doctrinal material."³⁰ The administration and faculty believe that a participatory educational model, embodied in the simulation, reflects their commitment to demonstrating the practical impact of the law and its concrete effects on individuals. Accordingly, students spend eight hours a week in formal classes and twice that amount of time in House-based activities structured around simulations.

The simulation is the primary educational activity in which first and second year students engage. The CUNY administration defines the simulation for its student body as:

a sequence of events that "simulates" — acts in the same way as — reality in certain respects and not in other respects. It is designed to eliminate and/or control most, but not all, of the vari-

28. We also interviewed a few students who expressed their belief that House meetings were largely a waste of time. These students stated that most of the discussions eventually evolved into rap sessions and examinations of students' personal problems. However, the majority of those students whom we met did not share this opinion. The students whose House meeting we attended seemed to feel the experience was valuable.

29. With the exception of the decision to have one student draft a letter in opposition to the election of a representative to the General Assembly, and the willingness of another student to write a letter urging the retention of the House counselor, the House failed to propose a solution to any of the other problems raised by the agenda.

30. CUNY LAW SCHOOL AT QUEENS COLLEGE 10 (1986-87).

ables in a complex situation. . . . It does not attempt to duplicate reality, nor to capture a static, fixed aspect of reality. Rather, it tries to recreate the dynamic, changing dimension of reality in a distilled form.

So, the work you do as part of a simulation is selectively, but not exactly, the same as what you would do as a lawyer. . . . By drastically shortening the time frame of the actual process, the simulation allows you to experience the consequences of your choices relatively quickly. In a simulation, you are asked to assume certain roles, and some out-of-role (except for the ubiquitous role of "law student").³¹

In accordance with this conception of the simulation, students participate in a full range of "lawyering activities" in their Houses, which includes negotiating, interviewing, counseling and drafting pleadings and memos.³² In addition, the simulation both determines, and to some extent is premised upon the content of the substantive lecture courses.

CUNY envisioned that each simulation would embody three distinct stages. The first is the "planning" stage. This portion of the simulation requires students to identify their "purpose" and "options," in addition to "making some deliberate choices."³³ The second stage of the simulation is entitled "doing" and calls upon students to initiate the plan previously developed and make "the adjustments that seem required in light of [their] underlying purpose[s]."³⁴ CUNY educators have designated the final part of the simulation the "reflecting" stage. In this portion of the simulation students are directed to seek "to understand what happened, why it happened, and what and how you are

31. THE WORK OF A CUNY LAW STUDENT: SIMULATION AND THE EXPERIENTIAL LEARNING PROCESS 1 (unpublished student handout, available from CUNY Law School).

32. John Farago explains, in further detail, the goals associated with student participation in "lawyering activities":

In House, a student might plan, execute or reflect on a lawyering activity, either individually or as a member of a group. The activities range from intake interviews, through negotiations and drafting exercises, to mediation and appellate arguments. In all of these the student is encouraged to approach the problem with the complexity and multiplicity of dimension with which lawyers approach each problem they encounter in their work.

Farago, *supra* note 6 at 471.

33. THE WORK OF A CUNY LAW STUDENT: SIMULATION AND THE EXPERIENTIAL LEARNING PROCESS 2.

34. *Id.*

learning about lawyering and yourself as a lawyer."³⁵

The rationale behind the simulation is to create an educational methodology that combines aspects of the apprenticeship with the case method.³⁶ However, CUNY educators specifically criticize the use of the Langdellian model by traditional law schools and regard the case methodology as deficient because the Langdellian method does not require students to apply the theories enunciated by the cases.³⁷ The simulation represents the attempt of CUNY educators to avoid the difficulties they believe characterize the traditional case method. The CUNY system is premised upon the notion that students will grasp with greater facility abstract principles in the context of the problems posed by a simulation. More importantly, CUNY educators contend that the simulation is consistent with the goal of participatory education for three distinct reasons. First, the simulation allows students to develop their "legal imaginations" by playing the "roles" of a client, judge, juror, witness, or adversary; second, this educational methodology teaches students to take calculated risks; finally, the simulation provides students with the ability "to integrate who they are as persons with what kind of lawyers they want to be."³⁸

In order to obtain a greater understanding of the educational methodology employed by the CUNY administration, we gathered and reviewed those materials that the faculty distributed to students describing the content and requirements of a simulation. The particular simulation we examined, entitled "*Educational Software Materials, Inc. v. Randy White*," is described as a "negotiation simulation."³⁹

35. *Id.* CUNY requires students to enter all of the simulation assignments and their "reflections" in a journal, which students keep in their Houses. House counselors review this work on a timely basis. A significant portion of a student's evaluation is premised upon the entries kept in their journals. Their entire evaluation is based upon the work they perform in the houses. See *infra* Section VII for a discussion of CUNY's evaluation system.

36. *Id.* at 2-3.

37. *Id.*

38. *Id.* at 3-4.

39. Prior to receiving this assignment, the first year class completed their first simulation, entitled "Mussel Bay." That simulation concerned the purchase and sale of a house in the town of Mussel Bay and raises questions about the validity of a zoning ordinance. The exercise required students to work on their interviewing and counseling skills. The "writing tasks" included the preparation of an "interview plan," "record of the interview," "reflection memorandum," "options memorandum," "office memorandum" and "feedback agenda." Students also were instructed both to adopt the roles of client and lawyer, and to do their assignments in teams of four.

During the course of our visits, we took the opportunity to visit the House counselor's lecture that served as the introduction to this simulation.⁴⁰ We also attended those substantive courses which provided students with legal principles relevant to this particular simulation.

The simulation required the division of the first year class into two distinct groups. One half of every House represented the corporation, Education Software Materials, while the remaining half served as counsel for the individual, Randy White. The faculty distributed to the entire class "General Instructions" in addition to a packet of "Statutes, Cases and Commentaries" setting out the law governing the simulation.⁴¹ Finally, there were two distinct additional sets of instructions for students representing corporate counsel and students serving as White's counsel.

The instructions distributed to students participating in the simulation raise legal issues associated with the validity of a contract for the sale of software. The fact situation set out in the materials involved a consumer, Randy White, who has a sixth grade education and is an employee of Pizza King. White earns a mere \$132.00 a week at his job. In the course of a conversation with a door-to-door salesman employed by Educational Software Materials, White agrees to purchase software. During the discussion that culminates in the execution of a contract, the salesman informs Randy White that there is an option to cancel the contract at any time. The salesman also induces the purchase, in part, by promising the delivery of a free television. White fails to make the necessary payments and in response the company sends him a demand letter and phones him several times at work. White's employer threatens White with his job if the phone calls continue.

The faculty provided all of the students involved in the simulation with the written contract and the demand letter. In addition, the materials set out the procedural posture of the case. The instructions inform the students that neither side has filed a lawsuit and therefore it is unclear which judge will preside over the case. In addition, the students are forewarned that the outcome of litigation is unclear because the various judges who might draw the case do not have a uniform

40. We again attended the House of Professor Richard Boldt.

41. The packet includes cases, statutes and commentaries, which the students would need in order to complete the exercises required by the simulation. With one exception, all of the cases in the packet are New York state cases. The faculty specifically directed the students not to attempt any additional research. None of the simulations in the first or second year allowed students to do their own research.

opinion about the resolution of the issues raised by the dispute between White and Educational Software Materials.⁴² Because suit has not been filed, the students are directed both to develop a negotiation plan with their "partners" and to negotiate "in role" with their adversary. The materials also instruct the students to counsel their clients "in role."

Each student received materials containing instructions about the simulation in addition to attending an extensive lecture about the content and goals of the exercise in their individual Houses. Accordingly, the House counselor directed the students in his house to begin the negotiation simulation by preparing a legal memorandum. The memo was to contain both an appraisal of the strengths of their particular client's case and an analysis of the legal questions posed by the simulation. He informed his students that the crucial issue was whether the doctrine of unconscionability precluded the enforcement of the contract. He also identified the applicable section of the Uniform Commercial Code and discussed the requirements of the statutory standard.

After providing the necessary directions for the preparation of the legal memo, the House counselor proceeded to describe the "learning goals" associated with the educational exercise and to relate the simulation to the legal principles taught in the students' substantive courses. He directed the House members to consider the contract issues in the context of a "private-public" law distinction which they had discussed in one of the lecture courses. The House counselor explained that when parties freely chose to enter into contracts both the initial execution of these agreements and the early attempts to resolve disputes are "private law matters." However, in those instances that courts nullify contracts because of a pre-existing imbalance of powers between the parties to the agreement, in the process, they must consider "public law" issues. The House counselor further suggested that "as a lawyer you can equalize bargaining positions."

In addition to discussing these contract issues, he also directed the House to consider the professional responsibility issues raised by the simulation. The House counselor posed the question whether an attorney's role is limited to educator during the settlement process, or in the alternative, whether a lawyer may take a more aggressive stance. For example, it is not altogether clear whether it is appropriate for an attorney either to coerce a client's acquiescence in the terms of a settle-

42. The natural inference from this presentation is that the outcome of the case may be contingent upon the choice of judge.

ment or to prevent a client from entering into a settlement agreement which the lawyer believes is unwise. The House counselor informed his students that one of the major goals of this simulation is to explore the attorney-client relationship and the potential conflicts that may arise during the negotiation process.

The House counselor concluded his lecture by asking his students to think about the dynamics of negotiation as they participated in the simulation exercise. He suggested that there are two different negotiation styles: the "hardboiled" approach as contrasted with the "constructive relationship" approach. He directed the members of his House to consider different motivations for negotiating which might include: the desire to settle; a wish to obtain information about an adversary in preparation for potential litigation; a concern about public image; and the ability to pay litigation expenses.⁴³

After the end of the House lecture, the members of each House joined the rest of the first year class for a session of Law and a Market Economy. The CUNY educators envision this class as an integration of property and contract concepts traditionally taught to first year law students in two separate courses. The first class we visited constituted an introductory contracts lecture delivered after the completion of the property portion of the course. A subsequent session we attended took place on the same day as the House lecture and served as an introduction to the Randy White simulation. An evaluation of these lectures will allow for an assessment of the quality of the more traditional aspects of legal education at CUNY and an appraisal of CUNY's attempt to integrate the apprenticeship model with the case method.⁴⁴

The first *Law and a Market Economy* class we attended dealt specifically with the transition from property to contract law. The basic premise of the entire class was that "property law" relates to the concept of "owning property," as contrasted to "contract law" which governs the "transfer of property." The faculty member went on to explore the history of contract, which she defined synonymously with an agree-

43. The students also were informed that legal aid was representing Randy White and that the organization either would provide its services free of charge, or in the alternative, would premise its fee upon a "sliding scale."

44. The large lecture class is the forum in which students study cases and legal principles and, therefore, is the aspect of CUNY law school that is most similar to traditional legal education. However, the faculty appeared to use the Socratic method rarely. All of the classes we visited were lecture classes. Nonetheless, dialogues did take place between students and teachers. Members of the classes felt free to ask the lecturers questions.

ment enforceable under the law. The right to enforce an agreement between two private parties first arose during the transition from feudalism to capitalism which occurred over several centuries. She attributed society's acceptance of the concept of contract to the rise of the mercantile class and the rejection of the feudal concept that status is a function of the ownership of property as opposed to an individual's accomplishments.

In an effort to reinforce these points, the lecturer then directed the class to go into the "role of an upstart middle class merchant in a House in London and you see yourself put down by kings and nobles. Your business is continually at risk." According to the lecturer, these "merchants" responded to uncertainties by introducing a value system premised upon the same theory of individualism that pervades contract law. The Puritans, who were merchants, subsequently incorporated the concept of contract into the American legal system. The lecturer concluded her discussion of the history of the contract by explaining that in every instance a court enforced a contract, the judge demonstrated a preference for individualism and capitalism "over status, aristocracy and feudalism."⁴⁵

Unlike the lecture on the history of contract law, the *Law and a Market Economy* class that introduced the Randy White simulation involved some discussion of case law and legal principles. However, almost the entire class period was devoted to analyzing *Williams v. Walker-Thomas Furniture Company* and the court's application of the unconscionability doctrine.⁴⁶ The lecturer compared the standard of unconscionability found in the common law with the standard established by the Uniform Commercial Code. She then proceeded to apply the "market system analysis," a concept the class apparently had explored in the past. The teacher explained that invalidating a contract under the doctrine of unconscionability did not conflict with the freedom to contract, a notion inherent in the "market system analysis." To the contrary, the legal doctrine presumes this freedom to enter into a contractual relationship unless there is an inequality of bargaining power.

45. During this lecture, which served as an introduction to contracts law, there was little or no discussion of cases or legal concepts. Before ending the class, there was a very limited discussion about "specific performance" and "partial performance." However, rather than relying on cases to exemplify these concepts, the students were told to look up these terms in BLACK'S LAW DICTIONARY.

46. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) involves the validity of an installment contract for the sale of consumer goods and the applicability of the doctrine of unconscionability.

In addition to applying this "market system analysis" to the concept of unconscionability, the lecturer identified two "world views" and the relationship of these views to this legal doctrine. Under the "traditional" or "social benefit" view every individual is perceived as equal with a few small exceptions. Consequently, courts remedy the minor inequities in bargaining power on a case by case basis through the application of unconscionability and other contractual doctrines. In contrast to the "social benefit view," the "new view" is premised upon a notion of class. The latter school of thought assumes society is inherently unequal, which requires government intervention and regulation to eradicate the inequities in bargaining power. The lecturer ended the class by emphasizing that this "class" view is at odds with traditional notions of freedom of contract.

In the course of visiting these formal lecture classes,⁴⁷ the contrast between the substance and format of CUNY classes to courses offered by traditional law schools was immediately apparent. Not only does the faculty fail to use the Socratic method, but the substantive material taught in these larger classes appears to be substantially different from the subjects taught to first year students in traditional law schools. One goal of CUNY's faculty is to integrate economic, historical and social materials into discussion of cases and legal principles. This goal was in part accomplished by identifying the following themes in the *Law and a Market Economy* lectures: the history of the right to execute a contract; the distinction between "public" and "private" law; the tension between the notion of class and the principle of individualism inherent in the freedom to contract; the applicability of a "market system analysis;" and the identification of differing "world views" and their relationship to various legal concepts.

Due to the integration of historical, political and economic materials, the CUNY faculty is under a heavy burden to cover a large amount of material. As a consequence, the development of the former themes, at times, appeared to be overbroad and perhaps oversimplified.⁴⁸ For example, the lectures failed to identify the source of these different "world views" or place these systems of analysis in their rele-

47. Our conclusions and impressions are premised upon the lectures that we visited. Time did not permit us to attend all of the formal lectures that the faculty gave in the *Law and Market Economy* course.

48. For example, a survey of three centuries of history in one class resulted in an oversimplification of the transition from the feudalism to capitalism.

vant historical context.⁴⁹ Consequently, the use of these various theories to categorize cases and legal principles at times was not entirely precise or persuasive.⁵⁰ Finally, a troublesome aspect of CUNY education was the failure of these formal lectures to train students how to analyze cases in depth. Instead, some of the students appeared to lack certain basic knowledge of the law or the ability to analyze legal problems. Unless these lectures familiarize students with basic legal principles the simulation will not be as valuable an experience as it might be.⁵¹

Although a concerted effort has been made by the CUNY faculty and administration to employ an educational methodology that allows their students to simulate the experience of a working lawyer, the educators may not be meeting this goal in one critical respect. For the majority of working attorneys, an important part of their practice is

49. It would have been helpful to designate what period(s) history case books on these world views and who typically adhered to these different perspectives. Without this information, it is difficult to ascertain the validity of these views today.

50. One part of the CUNY educational methodology entails recategorizing traditional legal courses. The rationale behind this practice is that the traditional system impedes learning and imposes a value system on first year students. *See supra* note 10 and accompanying text. Consequently, CUNY educators have recategorized the materials themselves and have accomplished this end by stressing certain distinctions they deem important. For example, one theme that the CUNY faculty uses persistently is a "public-private" law distinction. The question CUNY has failed to address is whether their system of categorization is any less free of value judgments or less artificial than the traditional method. An argument can be made that the traditional categories are more realistic and helpful to students because they are used widely in American legal culture.

51. Because the simulation is a problem-oriented methodology, students often read cases that are not of precedential value. Therefore, the readings required by the simulation do not always demonstrate the development of the law in a particular area. Consequently, it seems all the more important that the lecture classes train students to analyze cases and demonstrate how the law is developing. Most importantly, a legal education must train students to ask the appropriate questions. It was not clear that the student body at CUNY was developing these skills.

For example, although there was extensive discussion about the Uniform Commercial Code in both the course and House lectures introducing the simulation, the faculty did not explain the restrictions on its applicability. Although the relevant section of the Code was included in the simulation materials, conversations with students convinced us that they did not understand these limitations and why the Code was applicable to the negotiation problem. A few students with whom we met complained that they were not reading the major cases. One student was particularly concerned that his class had not studied sufficient property law. Consequently, during class, the faculty attempted to alleviate his fears by establishing that the course had covered as many aspects of property law as traditional law school.

volves the preparation of briefs and legal memoranda in support of various motions. Because the CUNY experience does not provide first and second year law students with the opportunity to study more substantive law in formal lecture courses or to practice research skills in coordination with their simulation work, the educational methodology becomes somewhat artificial.⁵² Perhaps CUNY's failure to stress the acquisition of these skills can be explained by the desire of the school's creators to be non-traditional. The creation of an innovative education methodology certainly should be applauded. However, the fallacy of their approach is that the school is training lawyers who must exist in a traditional legal world. If the goal is to train students to serve the public interest successfully,⁵³ the school must train these students to develop legal skills that will enable them to defeat their more traditional adversaries.

V. Faculty

The demands on faculty time at CUNY are acute, especially for those who teach in the House programs for first and second year students. Faculty offices are only steps away from the student desks in the Houses. Faculty are therefore available to students throughout the day. A great deal of faculty time is spent reviewing student writing and observing exercises in oral advocacy and client counseling. Several faculty members who have taught at other law schools before coming to CUNY reported to us that they often spend twelve or fourteen hours per day at the school, teaching, counseling students and reviewing student work. They also reported heavy weekend schedules preparing classes and simulations for the next week. This leaves little time during the semester for a faculty member's own scholarly work. Further, during one or two summer months faculty work together at the school preparing simulations and working through them as though they were stu-

52. We also found the CUNY's practice of encouraging students to learn LEXIS and Westlaw, as opposed to developing their traditional legal research skills a bit curious. As a general rule, this method of research is not necessarily the most efficient. In addition, computerized research is an expensive proposition. Thus, the practice of encouraging the use of computers also seems to be at odds with CUNY's desire to train lawyers to work in the public sector or for law firms that do not represent large corporate clients. In fact, it is often the wealthier client who can afford this type of technology.

53. See *supra* Section I for discussion of the general goals of CUNY Law School.

dents, in effect giving the simulations a "trial run." The CUNY curriculum committee recently has adopted a system whereby each faculty member in her third or fourth year (prior to the tenure decision that takes place in the fifth year) is provided with a paid semester off or "junior sabbatical leave" in order to provide the faculty with time for independent scholarship.

This time is indeed badly needed, according to the faculty, since they are all subject to the same requirements for tenure as other CUNY faculty members at Queens College including requirements of independent scholarship and writing. Currently, only six members of the CUNY faculty have tenure but many others soon will be eligible. The results of these imminent tenure decisions are uncertain, as is the application of all the CUNY tenure requirements to the faculty at the law school. Several members of the faculty are concerned that there is a likelihood that many faculty will be denied tenure in the next few years. They voiced some trepidation that denials of tenure to popular teachers will disturb the "consensus spirit" characteristic of the school.

The backgrounds of the faculty differ widely, some having taught at other schools — many in clinical programs — and others coming to CUNY from law practice. Most have some background in public interest law. There has been a concerted effort to build a faculty that is broadly representative of the diversity of New York and its law practice. About half the faculty are women and more than a third are members of minority groups. There has also been an attempt to gather a faculty that is committed to intensive teaching and counseling of students, and in this there has been much success according to students we spoke with. According to student reports — and from our own experiences — the faculty are almost uniformly pleasant and open, easily available to students or others. This availability may be required by the curriculum but it also seems sincere on the part of most faculty. Such attitudes and practices are particularly praiseworthy when one compares them to those of faculty at many other schools where faculty offices are often dark and faculty do not encourage students to seek them out for advice and counseling. Most important to the CUNY program is the salutary effect this faculty style has on student motivation and involvement.

There does seem to be some degree of faculty dissatisfaction with the tremendous commitment of time required to teach at CUNY, although the proposed liberal leave policy may help somewhat. The other area of faculty discontent is a partial disenchantment with the group processes of teaching and of working on the simulations. Almost 261

courses are team-taught by two or three instructors. Similarly, the House simulations are devised and supervised by groups of faculty who work together intensively. One faculty member who taught at another law school before coming to CUNY expressed dissatisfaction with co-teaching this way: "I feel as if nothing I do in class here is my own."

VI. Student Evaluation

Another highly innovative feature of CUNY law school is the method of evaluating student work. Because the simulation is the fundamental educational methodology utilized by the faculty and administration, the evaluation of the work of first year students is premised entirely upon their performance in these exercises. The only faculty member to review the work of these students is their House counselor.⁵⁴

In contrast to the first year experience, students in their second year at CUNY are not evaluated solely on their performance of simulation exercises. Instead, in their spring semester second year students spend about two days of each week working at an internship arranged by CUNY. Consequently, a second year student's evaluation is premised upon simulations in the fall semester, and on their performance at this internship and their related CUNY classes during the second semester. However, the same teacher evaluates their work in both semesters.

A third year student at CUNY law school attends courses that are very similar to classes at traditional law schools. Nonetheless the faculty uses the same criteria to evaluate student performance in these classes as are utilized for first and second year students.

A standard CUNY evaluation form provides the faculty with six different categories by which to grade the work of each law student.⁵⁵ The first category is entitled "professional responsibility" and requires a judgment about each student's "[d]eveloping awareness, conscientiousness, concern, and sense of responsibility regarding professional

54. The practical effect of this system is that only two members of the faculty evaluate each first year student at the end of each semester. As a general rule, first year House counselors are changed at the end of the fall semester. The rationale behind this practice is that it allows for students to work with and be evaluated by more than one faculty member. It was this policy that Professor Richard Boldt's students were objecting to in their House meeting. See *supra* notes 22-26 and accompanying text for description of house meeting. In contrast, in many cases only one faculty member reviews and evaluates a second year student's work for both semesters.

55. See Appendix C for a standard CUNY evaluation form.

choice and their consequences. . . ."⁵⁶ The second basis for evaluation is the "clinical judgment" of each student which is defined as the "ability to identify and diagnose problems in terms of objectives and alternative strategies. . . ."⁵⁷ "Legal reasoning" is the third category the faculty must consider when grading the performance of students and requires consideration of a law student's ability to "analyze a legal problem" and to "use legal materials creatively and imaginatively."⁵⁸ The fourth basis for grading a student's work concerns the student's "theoretical perspective". CUNY defines this category as the "ability to see a concrete legal problem in a broader social context, and to discern interrelations, underlying premises and implicit assumptions of the law; developing awareness of your own and alternative theories and perspectives and their implications for law and lawyering."⁵⁹

The final two bases for evaluating students work are "communication" and "management of effort." The former category requires the faculty to grade a student's ability to understand, listening and "express ideas in speech and writing."⁶⁰ The last part of the evaluation requires a judgment about each student's ability to prioritize his work and "to work collaboratively as well as individually."⁶¹

In addition to describing the areas of "competency" that the faculty must consider when evaluating student work, the CUNY evaluation form also defines the various "levels of competence" the faculty may assign to each individual category of performance. The form directs the faculty to assign the lowest grade, a number 1, to a student having "serious difficulty" and the highest grade, a 6, to a student who has achieved "excellence."⁶² Students in the first year of law school may not receive a 5, which is entitled "high competence," or a 6, an excellent. The form provides that "the highest rating that a first year student can achieve is 4, signifying "competence."⁶³

In accordance with school policy, these evaluation forms are not distributed to outsiders. Instead, official transcripts only record whether the particular student has passed or failed. However, by student re-

56. *Id.* at 2.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. The other levels of "competence" are 2, "difficulty" and 3, "reasonable progress."

quest the CUNY administration will compile a summary of a student's numbers for distribution to employers.⁶⁴

There are a number of differences between the CUNY evaluation policy and traditional grading systems. Several characteristics of this innovative system are very positive. A student's evaluation at CUNY is not premised upon one exam or paper at the end of the semester. In addition, the faculty does not award a student a single number or letter grade. To the contrary, each faculty member must take the time to evaluate each student in a number of different categories for work the student completes over an extended period of time. A review of the evaluation form creates the impression that faculty must closely supervise a student's work in order to complete the official form.

One of the most significant differences between the grading system used by the majority of law schools and the CUNY evaluation system is that the latter method is entirely subjective. There are obvious advantages and disadvantages to a subjective grading system. A few students expressed the concern that their relationship with the faculty member responsible for judging their work determined their grades rather than their actual performance. This objection is particularly troublesome in a system that allows one or two faculty members to evaluate a student's work for an entire semester or year. In addition, the vagueness of some of the evaluation categories has the potential to exacerbate those problems associated with a subjective evaluation system.

VII. Students and Student Admissions

Like the faculty, the student body is diverse and reflects to a large extent the diversity of New York and of our society: over half the students are women, about one-third are members of minority groups. The average age of the students is over thirty and almost all are from the New York metropolitan area. Most have had previous careers including students who have been businessmen and business executives, nurses, teachers, public officials, policemen, social workers, political activists, and housewives. Many of them have small children which in part has prompted the school-wide effort to open an on-site day care center.

64. A few students complained that the grading system was tremendously confusing for employers. More specifically, they stated that the practice of using different numbers for evaluating student performance in the first year created the greatest amount of confusion.

Some students hold outside employment, which according to faculty reports, distracts from those students' law study. The majority of students, however, appear to be highly motivated and very positive about the school's curriculum and organization — judging both from our own observations and from faculty comments. This must be at least partially the result of a process of self-selection of the student body, all of whom have opted for an alternative legal education.

Admission to CUNY is competitive. Over the past four years, there have been about 800 applications for the 140 places in each class. The process of reviewing applications is meant to be highly personal. There are personal interviews for about one-half of the applicants, a notable departure from the admissions process at other law schools. The admissions committee is composed of administrators, faculty, students and staff. The committee seeks to ensure that each student is academically qualified for the program and also to evaluate the suitability of the student for the school's program. The committee therefore looks for students who have had experience in the public sector and are motivated to practice public interest law. Interestingly, about two-thirds of accepted applicants have chosen to attend the school perhaps indicating that the admissions process has been highly accurate in selecting applicants who truly are interested in the school. Attrition has not been a problem, averaging about five percent per class.

Carlton Clark, the director of admissions, indicated that younger students tend not to get as much out of the CUNY program as older students and that the older students tend to be more favorable toward the "learning-by-doing" approach at the school. The admissions staff concentrates its recruiting on the various campuses of the CUNY system, state colleges in New York and small colleges. However, the admissions office also makes some effort to recruit students at such unorthodox locations as Indian reservations and community group meetings. These efforts, according to Clark, reflect the school's attempt to diversify its student body and to promote interest in public interest law. Although tuition is low (approximately \$4000 per year) in comparison with private law schools, sixty percent of the student body receives some type of financial aid.

In summary, the student body at CUNY is unique in its composition and in its interest in public law. The student body differs markedly from the many law schools whose students are mostly fresh from college. Carlton Clark stated to us that in its composition the applicant pool resembles that of a night, part-time law school: many working people, many older people, and many from disadvantaged backgrounds.

VIII. Placement

Unlike placement offices in most traditional law schools the CUNY placement center does more than merely inform its students about potential jobs in the legal market. During one of our visits to CUNY, we had the opportunity to meet with the placement director.⁶⁵ She explained that the office's philosophy is that students should be "counseled" during their search for jobs. Accordingly, the office helps students prepare resumes in addition to training them for interviews. A typical placement file contains a cover letter, resume and open letters of recommendation. It is the current practice of the faculty to write detailed letters of recommendation.

In addition to emphasizing the importance of the office's philosophy, the placement director provided us with data reflecting the categories of employment that members of the first graduating class have accepted.⁶⁶ According to the data, ninety-three members of the class have jobs, an additional five students have outstanding job offers and four were not looking for jobs at the time. The majority of the class did not find their jobs until after graduation. There were 132 students in this class. The remainder of the class either did not have jobs or their status was unknown.

The vast majority of CUNY's first graduating class who are currently working are employed by Legal Aid, Legal Services, Legal Advocacy projects and small to medium sized law firms. These firms do not have traditional corporate practices. Another ten students have obtained federal court clerkships, which included two *pro se* clerkships, one motion clerkship and two district court clerkships. Other examples of the types of employment these students have found include jobs with New York City Agencies, state courts and law schools. According to the placement director, ninety percent of the second year class has found law related employment during their summer break. The Revson Foundation pays a stipend for some students to do public service work during the summers.

One of the most significant indications of the vitality of the CUNY experiments is and will be the ability of its graduates to find employment. Clearly the results for the first graduating class are im-

65. Nan Feyler is the associate director of CUNY's placement office and also teaches at the school.

66. See Appendix D for employment data prepared by the CUNY placement office.

pressive. Perhaps one explanation of these results is the intensive clinical program that students participate in during their second year and the contacts that students must make at those jobs. The placement director commented that the office intends to network its graduates as much as possible. At present, the school is considering contacting the class that recently graduated and assigning each third year student to one of its alumni.

IX. Conclusion

Although the CUNY experiment is young, it is clear that the educational methodology is both innovative and non-traditional. One of the most positive aspects of the CUNY educational program is the close relation of students and faculty. Faculty not only counsel and advise students, but also closely supervise student legal writing and advocacy practice. Indeed, the amount of individual attention students receive from their teachers is probably unprecedented and contributes to an enthusiasm among the student body about their school and their work in the simulations. The positive attitudes held by most students about their education and overall experience at CUNY were impressive and uplifting. On the whole, the cynicism about law and legal practice so prevalent in many law schools does not seem to exist at CUNY.

The program is also successful in demonstrating to students the practical effects of the law — effects which are often far removed from the experiences of 23-year-olds in their first year of law school. The emphases on alternate dispute resolution, professional responsibility and public interest law are a welcome relief to most schools' orientation to private commercial law. The simulations and cross-doctrinal courses do give students a sense of how legal categories are tentative, of how they overlap, and of how they can contradict one another. Finally, while other schools are still seeking to diversify their communities through affirmative action programs, CUNY has already achieved that diversity. The voices of women, blacks, Hispanics, Asian-Americans, lesbians and gay men, often silenced at other institutions by unspoken demands for conformity in teaching and writing, are heard clearly by students at CUNY.

Even though CUNY has accomplished some of its original goals, certain aspects of the CUNY curriculum require rethinking. In fact, members of the CUNY administration and faculty currently continue to reexamine important aspects of the program and curriculum. Despite the successful integration of clinical skills into legal education

through the use of the simulation, CUNY educators have been remiss in failing to emphasize critical and analytical skills. Consequently, CUNY students may be acquiring practical clinical skills but may not always be obtaining those analytical skills more easily taught in the classroom. Part of this is due to the use of simulations that do not allow students to conduct their own legal research. The simulation methodology can become tremendously artificial and frustrating for students who have not studied a particular area of substantive law presented in the simulation. A few students complained that simulations raised legal issues which they could not understand because they had not studied the materials in class and because the format of the exercise precluded them from researching legal issues that arose in the course of the simulation.⁶⁷

The major complaint we heard about legal education at CUNY is that students are not provided with sufficient legal doctrine or theory. Because the courses are tied to simulations and traditional legal categories are rejected, students complained that they read insignificant cases and that their education does not expose them to the "overall picture." In addition, in classes and in simulations, close analysis of judicial decisions on occasion is replaced by general overviews that seem superficial. Some students complained that the education methodology is inefficient because they are constantly "role-playing" and are required to work in groups rather than developing their own analytical skills.

The group orientation of most work during instruction is indeed frustrating to many — student motivation arises from close faculty supervision but even some faculty are dissatisfied with the group requirements of their own teaching and class preparation. Some of the cross-doctrinal courses are too ambitious covering too many difficult topics in the course of a semester and consequently lack depth. Even if legal education based on decided cases is outmoded and inefficient, one wonders whether students should not at least be acquainted with the traditional mode of organization. CUNY's graduates will, after all, be oper-

67. For example, second year students participated in a simulation which concerned agency review and the New York City food stamp program. The students were provided with an amended complaint and told to prepare for a mock trial. Subsequently, the faculty changed the requirements of the project and asked one group of students to prepare to make oral arguments in support of a motion for a preliminary injunction. The remaining students were required to argue against the granting of an injunction. The students with whom we spoke complained that when they were preparing these assignments, they had no knowledge of the law relating to preliminary injunctions or agency review.

ating in a legal world where most other attorneys will have been educated that way and will conceive of legal problems according to a Langdellian model. In short, it seems to us that students at CUNY could benefit from greater exposure to the paradigms and practices of traditional legal education, if only to understand why those paradigms are now inadequate.

Although the emphasis at CUNY on legal practice is refreshing, the school on a few occasions could be compared to a trade school — especially when the emphasis on practicality was so intense as to preclude attention to legal theory. Although the success of its recent graduates appears to indicate that the school has a healthy future, the CUNY administration and faculty ought to learn something from the fact that forty percent of its first graduating class failed the bar examination.⁶⁸ Perhaps the most important question that CUNY should ask itself is whether its rejection of many features of traditional legal education is necessary.

It is clear that the CUNY experience represents a significant departure from the Langdellian model. Although traditional law schools have retained numerous aspects of that methodology, many schools have departed from this model by introducing first year courses on legal method or legal process, integrating interdisciplinary courses into their curriculum, using non-case teaching materials in seminars and establishing extensive clinical programs.⁶⁹

Traditional educators might benefit by adopting certain aspects of

68. Conclusions about CUNY's failure to stress traditional analytical skills are not premised upon this fact. Although the bar examinations do not indicate necessarily the level of students' analytical skill or their ability to be good lawyers, the failure rate was a matter of concern among certain students. In addition, the legal community as a whole deems a school's bar passage rate significant. A recent article indicates that the CUNY community is concerned about their students' performance on the bar exam and may respond by instituting a more traditional curriculum. Adams, *supra* note 4 at 4, col. 3; *but see* Copelon, *supra*, note 4.

69. For example, in the Legal Method class at Columbia, first year students were exposed to interdisciplinary problems involving issues of tort, contract and antidis-crimination law. In certain respects the writing problems were similar to the simulation exercises used at CUNY. Students were exposed to judicial pleadings and courts files in their first semester. As a required writing assignment, one of us directed a small group of first semester students in researching and writing an *amicus curiae* brief for a public interest law firm in an employment discrimination case before the New York Court of Appeals. Although the resulting brief was heavily edited, the experience allowed the students to participate in litigation and to consider the consequences of their actions as prospective attorneys.

the CUNY curriculum and experimenting with the use of extensive simulated legal problems and encouraging their students to consider the broader themes and issues presented by these problems. Exposing students as early as possible to the litigation process and court pleadings is another aspect of the CUNY experiment that may be integrated easily into a traditional curriculum. Finally, introducing students to themes of legal history and political theory would not require any significant departure from traditional notions of legal education. At the same time that CUNY educators should reexamine their rejection of important aspects of traditional legal education and their lack of emphasis upon traditional legal analysis, other law schools would do well to experiment with the use of certain innovative aspects of the CUNY experiment.

XI. APPENDIX

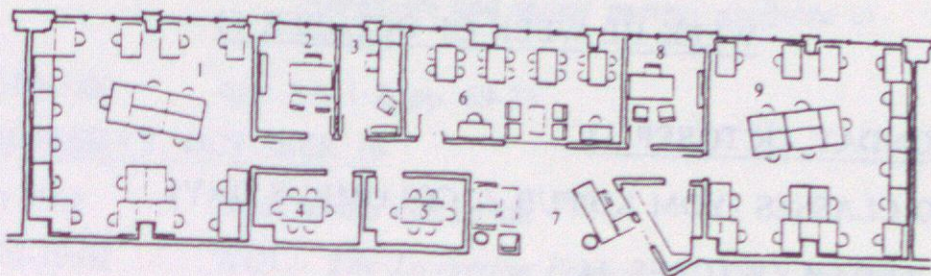
- A. Diagram of a House
- B. Schedule for First Year Law Student
- C. "EVALUATION OF STUDENT
WORK" Form
- D. Employment Data for Class of 1986

1987]

CUNY: Outside Perspectives

37

Appendix A



1. House 1
2. Faculty Office
3. Office
4. Conference
5. Conference
6. Section Library
7. Reception/Secretary
8. Faculty Office
9. House 2

Appendix B

WEEK III: WEEK OF OCTOBER 13

MONDAY, OCTOBER 13

NO CLASSES (YOM KIPPUR & COLUMBUS DAY)

TUESDAY, OCTOBER 14

9:00-12:00 House work; Drafting the Memo

*NOTE: By Tuesday you will have made some plan for your memo. Bring this to these sessions on the memo.

9:00-9:30 Meeting with house counselor/partner

9:30-10:30 Same-role work groups meet to brainstorm issues on preparing draft.

10:30-12:00 Work on your own on the memo.

12:15-1:45 Student-Initiated Time

1:55-2:50 WOL: *Becoming a Lawyer*, pp 152-153; WOL Packet 1-2 (read entire packet) *Selected Standards on Professional Responsibility*, pp 3-5 (Preamble to the ABA Code of Professional Responsibility).
pp. 30-32 (EC 5-14 to 5-20)
pp. 34 (DR 5-105)
pp. 69-75 (Preamble to the ABA Model Rules)
pp. 91-95 (Rule 1.7)

3:00-3:55 LME: LME insert A, "Additional Cases on Restrictive Covenants," pp. 1-end

4:05-5:00 AA: Read AA 1-2, pp. 41-52; Suppl. AA-1, pp. 1-30

WEDNESDAY, OCTOBER 15

9:00-10:00 LEDP: Review of the *McMinn* decision

1987]

CUNY: Outside Perspectives

39

10:15-11:45 House work: Drafting the memo
Associates and senior partner available to consult

12:00-1:00 AA: AA 1-2, pp. 69-75

THURSDAY, OCTOBER 16

BY 9:00 Draft memo due in file

9:00-10:00 WOL - *The Lawyering Process*, pp. 299 (3rd line from top) - 304 (bottom); 333 (bottom) - 339; 999-1004

10:15-11:15 LEDP - LEDP 1-2, pp. 136-154

11:45-1:15 Student-Initiated Time

1:30-5:00 House Work: Final Memo; Writing Class
Writing Class: Revising and Editing the Memo

1:30-2:15 Houses 1, 2, 3 and 4 attend (Room 135)

2:30-3:15 Houses 5, 6, 7 and 8 attend (Room 135)

FRIDAY, OCTOBER 17

9:00-12:00 House Time

9:00-10:15 House meets with counselor: group feedback on drafts

10:30-12:00 House meeting

12:15-1:15 LME: LME pp. 138-147 (read carefully); pp. 108-137 (background reading)

Appendix C

EVALUATION OF STUDENT WORK

Student: _____

Evaluated By: _____

Activity: _____

Date of Evaluation: _____

See next page for descriptions of Competencies and Levels

<u>COMPETENCIES</u>	<u>LEVEL</u>	<u>COMMENTS</u>
PROFESSIONAL RESPONSIBILITY		
CLINICAL JUDGMENT		
LEGAL REASONING		
THEORETICAL PERSPECTIVE		
COMMUNICATIONS		
MANAGEMENT OF EFFORT		

Description of Competencies

PROFESSIONAL RESPONSIBILITY. Developing awareness, conscientiousness, concern, and sense of responsibility regarding professional choices and their consequences, including the effects of professional role, the need to adhere to or depart from professional norms, and the values implicit in those choices.

CLINICAL JUDGMENT. Developing ability to identify and diagnose problems in terms of objectives and alternative strategies; to assess probabilities of their risks and benefits; to reflect on and learn from experience.

LEGAL REASONING. Developing ability to analyze a legal problem and to synthesize the law and facts of a given situation; to generate, justify and assess the strengths and weaknesses of alternative legal positions; to use legal materials creatively and imaginatively.

THEORETICAL PERSPECTIVE. Developing ability to see a concrete legal problem in a broader social context, and to discern interrelations, underlying premises, and implicit assumptions of the law; developing awareness of your own and alternative theories and perspectives and their implications for law and lawyering.

COMMUNICATION. Developing ability to understand and exercise choice with regard to the structure, process, and context of verbal and nonverbal communication; to express ideas in speech and writing with accuracy, clarity, and economy.

MANAGEMENT OF EFFORT. Developing ability to use time, resources, and energy with awareness of competing priorities in a way that produces optimal legal services; to work collaboratively as well as individually.

Definition of Levels of Competence

- | | |
|--------------------------------|--|
| 1. <i>Serious difficulty:</i> | does not seek or respond to supervision/guidance and does not perform adequately |
| 2. <i>Difficulty:</i> | needs maximum supervision/guidance to perform adequately |
| 3. <i>Reasonable progress:</i> | performs competently with some supervision |

4. *Competence:* performs competently, and is learning to work in a consultative manner
- 5.* *High competence:* performs well, and is learning to work in a consultative manner
- 6.* *Excellence:* does outstanding work, and routinely works in a consultative manner

NOTE: Levels 5 and 6 are not used in evaluating the work of first-year students. The highest rating that a first-year student can achieve is a 4.

Appendix D

CUNY LAW SCHOOL AT QUEENS COLLEGE
Class of 1986 Employment Data

November 21, 1986

The following reflects the categories of employment which the 1986 CUNY Law School graduates have accepted. These figures do not reflect a number of students who are seriously considering offers. We learn of additional graduate job information on a regular basis and continually update this information. For more information feel free to contact Nan Feyler, (718) 575-4231.

Legal Aid/Legal Services and Community Legal Advocacy Projects:	24
Small to medium sized firms:	24
Federal Court Clerkships:	10
New York City Agency:	11
State and City Court Clerkships	7
New York State Agency:	2
Academic/law teaching:	3
District Attorney Office:	2
Large Law Firm:	1
National Civil Liberties Organization:	1
Started own practice:	1
New York Assembly Members office:	1
LLM Programs:	1
State Agency — not New York:	1
Legal Publishing:	1
Other:	3
<u>TOTAL:</u>	<u>93</u>
TOTAL MEMBERS OF CLASS OF 1986:	132

The City University of New York Law School: An Insider's Report

Vanessa Merton*

The Law School of the City University of New York ("CUNY") is an experiment in whether it is possible for lawyers to integrate their lives. It is not, primarily, an institution with a somewhat novel, somewhat derivative, approach to legal education (although it is that). It is a place where lawyers try to bridge the gap between love and work, those so often dichotomized constituents of life. At CUNY we are trying simultaneously to equip students for survival in the current legal system and to burden them with a critical perspective on that system; to do and think, to practice and teach, to function and feel.

Already I hear the protests. For any one of us, insider or outsider, to presume to define even a single aspect of this complex institution is of course rather silly. There is nothing I can say that several of my colleagues¹ will not dispute. There is no point, however, in lacing this piece with excessive caveats. Necessarily, what follows is a partial account, partial as distinguished both from complete and from impartial. So long as it is billed "*An Insider's Report*," I feel free to proceed with the intimidating enough task of trying to organize my perceptions and summarize my subjective experience of the past four years.

* Associate Professor of Law, City University of New York Law School, 1983-present.

1. When I use the word "colleagues" throughout this piece, I mean not only faculty but support staff, administrators, and students. This is not affectation, but the way we in fact describe ourselves and one another in our daily business memoranda, etc. It sounds symbolic, and it is, but it points to one of the truly extraordinary dimensions of CUNY: the genuine attempt to include and honor every member of the community, from the maintenance staff and security guards to the tenured professors. While Duncan Kennedy may talk about paying janitors and deans the same, CUNY is the only law school I know in which the "professionals" have organized and implemented a system for re-allocation of hard cash. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STANFORD L. REV. 413, 413 & n.1. Eighty percent of the faculty and administrators whose annual salaries equal or exceed \$40,000 have contributed 1% of their salaries to a fund providing salary supplements to all employees making less than \$20,000 per year. I cite this not because it's an adequate response to socio-economic inequality — it is not — but because it is a tangible manifestation of a genuine commitment. It is also one of the things I like best about working here.

Four years: as I find myself describing it to friends, the most tempestuous, demanding, yet literally revivifying four years of my professional life. It has been as unlike the previous eight years of academe or quasi-academe² as anything I could imagine. The intensity, and the way in which it has made me test and expand my limits, is reminiscent of the years I spent with the Legal Aid Society Criminal Defense Division as a trial lawyer in New York City's Criminal Court. That was the only other time in my life in which I learned so much, so fast, and so hard. The irony is that a good deal of the time here has been spent unlearning what I learned with Legal Aid, and unlearning even more of what I had learned in my life before Legal Aid.

That may be a good catch-word to pick up as the theme of this piece: CUNY is certainly as much about unlearning as it is about learning. We are trying together, collectively (those are not synonyms, as I have learned) to unlearn fear, hierarchy, racism, gender bias (which to us includes sexism, homophobia, lack of respect for childrearing, etc.), distrust, and despair. In this country, in this society, in this historical moment, that isn't easy. It may also be futile, and worse, dangerous. Most of those habits of thought and feeling have well served most of us at one time or another. At CUNY we are asking each other to give them up and to replace them with something so fragile, so difficult to define, that it may indeed be fools' business to do so.

Yes, that seems right: CUNY is about learning to be a Fool: a Fool like Lear's, a Fool like the one in *Ran*, Kurosawa's adaptation of *Lear*. And at the same time, we are learning to be lawyers?

Perhaps that's not such a stretch after all, when you consider how close the average lawyer's business is to that of a court jester. I spend a lot of time with lawyers. I'm quite active in about twenty different lawyers' groups and bar associations. From the Lawyers Guild to the New York Women's Bar Association, from the Association of the Bar of the City of New York to the Plaintiffs Employment Lawyers Association, I see practicing lawyers who seem not to know why they are doing what they do, except that it will please somebody else who will then reward them for that pleasure. They are very good at figuring out what is needed to produce the pleasure and the reward; they are very sharp and skillful at playing word games and doing elaborate and exotic dances.

2. Teaching in N.Y.U. Law's civil and criminal clinical programs; a fellowship, followed by staff position, at the Hastings Center Institute of Society, Ethics and the Life Sciences; research and teaching in the College of Physicians and Surgeons, Columbia University.

Isn't that a pretty good description of a court jester's job?

The only difference between the other court jesters and Lear's/Ran's Fool was love. The Fool was not ready to forsake his king when he was no longer powerful. The prudent, professional court jester is loyal to the king only while his power lasts. The court jester must be adept at changing his master and relocating his loyalty. The court jester does not have a life of integrity. The Fool does.

At CUNY we hope our students evolve into Fools, which means that they will be able to emulate the song and dance and causerie of the best of the jesters, but will do so only in the service of someone they love. If you will, in the service of human needs.³ That's what Mark Barnes and Judith Kleinberg, authors of *CUNY Law School: Outside Perspectives and Reflections*⁴ (hereinafter "the Outsiders")⁵ just didn't get. And it's understandable that they didn't get it. Had they gotten it, what would they have thought of it, is I suppose the next question. Can you do it — can you love and work at the same time? And assuming that it's possible, is it desirable? And if it's possible and desirable, can you teach it?

It is a daunting prospect. God knows we have not figured it out. We think it's important.

I guess the point that seemed most conspicuously missed in the Outsiders' report was that so much of what we do at CUNY is fluid, constantly in motion, always subject to reexamination, revision, change. Because we try to identify the premises of each choice we make; because we try to have a reason for everything we do other than that that is the way it has been done before; because we try consciously to examine the consequences that result in light of the premises we've es-

3. The motto of CUNY Law School is "Law in the Service of Human Needs."

4. 12 NOVA L. REV. 1 (1987).

5. The title chosen by Kleinberg and Barnes for their piece, together with my diagnosis of what at root limits its utility as an account of CUNY, makes this short-form reference irresistible, as well as the title of mine inevitable. The titles suggest a well-recognized issue of formal social science: the impact of one's status as insider or outsider on the sense one is able to make of the phenomena observed in a particular institution or subculture. This theme is, I'm afraid, most systematically analyzed in the work of someone whose conclusions I do not entirely share. See R. K. Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 77 AMERICAN JOURNAL OF SOCIOLOGY 9 (1972), reprinted in R. K. MERTON, *THE SOCIOLOGY OF SCIENCE* (1973) as *The Perspectives of Insiders and Outsiders* at 99. R. K. Merton is critical of the assertion that insider status provides not just privileged access to data but superior understanding of that data and points to counter-examples such as Tocqueville, Flexner and Myrdal.

poused; and because we place a value on integrity which translates sometimes into chaotic individualism and sometimes into a powerful and authentic community, it is virtually impossible to carve out a particular sequence of concrete behavior and ascertain inductively what this place is up to. The basic methodological fallacy of the Outsiders was that they really did try to treat what they saw in a given span of days as somehow typical or definitive or capturing the quintessence of CUNY.⁶ That might be possible for a gifted social observer like Joan Didion⁷ or Erving Goffman,⁸ but for us lawyers it is rather unreliable.

A good though small example is the Outsiders' report that students had been forbidden to engage in original legal research in the course of a simulation. When I read this I was astounded and appalled. I immediately went to find members of the first-year faculty, to whom this had been attributed, to find out whether this was true, and if so why on earth it was. This strikes me as the sort of elementary fact-checking that we try to impart to our students in the second-year curriculum on techniques of fact investigation. However, the Outsiders chose not to do that — or at least not to report on having done it — and so did not provide the explanation that I received: that in an effort to deal with the tendency of some first-year law students to procrastinate, trying to find more and more and more cases without buckling down to analyze and write, some first-year faculty had strongly suggested to these students that they would be more on track in terms of the learning objectives of the exercise if they would focus on synthesizing and applying the authority they already had rather than on trying to find additional material. Wholesale discouragement of all first-year students, including those who could afford to spend the limited time to be devoted to this particular piece of work in that way, was not "the program." The Outsiders certainly left the impression that it was.⁹

6. See J. DIDION, *THE WHITE ALBUM* (1979).

7. See E. GOFFMAN, *ASYLUMS* (1962). See generally H. GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 1967 on the significance of sociological inquiry for "common understandings."

8. I should add that I have serious concerns about the way CUNY teaches basic legal research. We have tried two different approaches already and are currently considering yet another variation. I believe that the planning, execution and evaluation of legal research should be an integral component of all the simulations and courses in the first three semesters, and whenever I get back into the first-year or second-year curriculum and am in a position to influence that choice directly, I will seek to implement such a system.

9. Kleinberg and Barnes, *supra* note 3, at 19 n.42. What, I wonder, is the *correct*

This is just one small example, though, of the confusion the Outsiders apparently labored under. They label much that is ephemeral and epiphenomenal, the product of who happened to be assigned to a given piece of the program this year, as central. They seem to be collapsing, in what I dimly recall as Thomistic categories, the accidental and the essential. It is as if generalizations about the Langdellian model were to be based on the antics of my first-year contracts professor at NYU, a petty tyrant who tried to terrorize students and did degrade women and who, when challenged on the ground that his conduct interfered with our learning, laughingly dismissed that as irrelevant to his job.

A prime example of the Outsiders' failure to get what is going on here is their discussion of the operation of the Houses. Among the faculty at CUNY we have had many conversations about what the House is and what being a House Counselor means. In the letters I write explaining our program to prospective employers of our students, I usually describe the House as the basic work-group unit. In most American workplaces there is no equivalent. In House, the discussion of work is viewed as a component *of* work; the planning collectively and reflecting collectively on how one has done the work one set out to do, is a form of labor we take seriously at CUNY. There is more; the House is also where we experience the interrelationship of the personal and the political, the so-called private and public spheres. In the Houses all of us — students, faculty and support staff — witness directly the ways in which our norms of interaction affect both the substance of what we do and the way we feel about what we do. In the House we try to live by explicitly alternative norms, to observe the effects of that effort, and to incorporate those observations into our critical appraisal of the institutions of American law and society.

For example, CUNY generally uses a consensus model of decision-making rather than an electing and voting model. Too many of us have spent too long as oppressed minorities in ostensibly democratic institutions ruled by majoritarian power to have much faith in that model. One basic difference is that when you vote, you don't have to explain

meaning of the term that the Outsiders were looking for? Whatever it is, I suspect that, for example, Justices Rehnquist and Brennan would not both accept it — although each would probably agree that the other had not “really understood the meaning or applicability of [the] principle.” *Id.* I wonder, too, what sophisticated articulation of the concept and, more important, understanding of the principle *in action* the average Columbia Law student would display.

your position to anyone; when you block consensus (which does not occur each time you are in disagreement with what most of the collectivity thinks is best) you must explain, or else defeat yourself. The whole point of withholding consensus is to create more time and space to explain your position, so that the rest of the group can strive to meet the concerns you've expressed and hopefully bring you into the consensus. There is also a qualitative difference between the way it feels to lose under a voting system and the way it feels to participate reluctantly in a consensus after the rest of the group has gone as far as it can to honor your divergent views.

In the Outsiders' view, the House they observed demonstrably failed because "the students did not engage in 'rule' making" but merely in "airing of issues" and "extensive and lengthy discussions." What are the premises implicit in that assessment? Some that seem apparent are: 1) the process of sharing conflicting views openly is worthless; 2) meaningful and lasting resolution of a conflict in a way that preserves rather than fragments community can be achieved by voting; 3) in sum, that only product, not process, matters. How ironic a set of premises for lawyers, of all professions supposedly the most cognizant of the value of process, in particular for lawyers who are highly critical of the students they observed for their inadequate articulation of the meaning of "due process."¹⁰

The House is an incredible laboratory for experimenting with all sorts of forms and models of rule-making and decision-making, but that is not its primary function. The committee system of the governance structure is designed for that. Very often, the point of what happens in House is that conflict is expressed and acknowledged, not resolved. We try consciously to use techniques of facilitation that will make the conflict productive albeit perhaps still painful and frustrating. It is important, we believe, for all of us to *experience*, not just talk about, the phenomenon that people we work with closely and need to depend upon do not share our views and values on fundamental issues, and to explore the consequences of that divergence for successful collaboration. It is important to know whether you can deeply disagree with someone in one area and yet cherish that person's contribution on another front,

10. A CUNY Insider has to smile whenever using this term since it has acquired an overlay here that underscores its ambiguity; when trying to explain some facet of the program to new faculty, students or staff, those of us who've been here a while often find ourselves saying "traditionally . . ." meaning "in the first two years . . ."

and still want that person to participate in your community despite your differences. Paradoxically the experience has been that not infrequently, the clash of views leads to greater understanding and movement from positions to the point at which conflict can be resolved in a consensus fashion, but the absence of such resolution is no failure by our lights.

To an Insider, the description of the House meeting, untextured as it necessarily was by a lack of awareness of the ongoing dynamics of the interaction among particular House members, sounded not as if "very little was accomplished" but like a reasonably good House meeting. Had outsiders not been present, it is possible that a "feedback," "criticism and self-criticism," review of "good points and bad points," or some other such brief period of commentary on the meeting *qua* meeting would have occurred. During that period there may have been some discussion of the facilitator's choice (not "failure" or "mistake," but *choice*) to allow the group to depart substantially from the agenda. It might have been discussed in light of one of the more prosaic purposes of the House: to provide an experiential opportunity for learning about group facilitation, a skill valued by any lawyer who tries to work with professional committees, boards and community organizations.

There are a dozen other instances in this piece of failing to grasp what it is we are trying to do at CUNY, and thus misapprehending what has worked and what has not. They range from the false premise, presented on the second page and reiterated on the thirty-fourth, that CUNY began with a wholesale rejection of every component of "traditional"¹¹ legal education to the equally inaccurate assumption that the performance of our first graduating class on the New York bar exam that generated a sudden impulse to re-examine that rejection. Even from the Outsiders' own description, it is evident that CUNY incorporates a myriad aspects of the standard-issue law school. Some of that is deliberate, some unconscious. For us the question is hardly framed, however, as the Outsiders define it: "whether to *begin* to adopt the ways of more traditional schools, or continue its present course of rejecting traditional legal education." Similarly, as I have already said, we have been reexamining our curriculum and every other choice we have made in a serious and systematic way since CUNY's inception. Another example is the statement that "Faculty evaluation of students' work is deemphasized."¹² At this I can only laugh as I think about the

11. Kleinberg and Barnes, *supra* note 3, at 2 (emphasis added).

12. *Id.* at 6.

literally hundreds of hours I and other CUNY faculty spend on painstaking evaluation of student work, culminating in detailed end-of-semester evaluations which often run to five pages for a single student, and compare that with the total absence of evaluation in my law school experience outside first-year moot court and third-year clinic. (I was graded, all right, but my work was not evaluated).

It is impossible, and would be fruitless, to enumerate every instance of mis-apprehension on the part of the Outsiders, but one last observation invites a specific response. The Outsiders wonder whether CUNY students should not "at least be acquainted with the traditional mode of organization"¹³ of the law and note that traditional doctrinal categories may be "more realistic and helpful to students because they are used widely in American legal culture."¹⁴ It is simply not the case that our students leave law school¹⁵ innocent of the classic divisions between, to pick examples, tort and contract.¹⁶ What CUNY students learn is both that such categories are used in the legal culture and that they are limited and limiting. In the process of trying to trace the boundaries and connections among them, our students come to realize that the effort to translate a given human problem into its appropriate pigeon-hole may deflect lawyers and the legal system from more important dimensions of the problem, and that the judicial choice of a particular doctrinal framework is as often the function of societal forces as it is of pure legal analysis.¹⁷ There is a qualitative difference, one that seemed to elude the Outsiders, between unawareness of a model and a skeptical approach to that model which sets it in the context of other competing models in order to demonstrate the inherent artificiality of

13. *Id.* at 33.

14. *Id.* at 24 n.50.

15. The Outsiders apparently saw virtually nothing of our second and third-year programs and did not talk with third-year students, who are loaded down with highly "traditional" courses such as Wills, Real Property, and U.C.C.

16. Of course the indivisibility of those two categories in particular is increasingly questioned. See G. GILMORE, *THE DEATH OF CONTRACT* 87-90 (1974); see also Bolla, *Contort: New Protector of Emotional Well-Being in Contract?*, 19 WAKE FOREST L. REV. 561 (1983); Note, "*Contort*": *Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance, Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 510 (1985) and authorities cited therein.

17. Compare, e.g., *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y. 2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969) with *Victorson v. Bock Laundry Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975) (effect of statute of limitations on products liability claim depending on whether claim characterized as sounding in tort or contract).

any model.

So, I do not agree with the Outsiders' suggestion that CUNY students could "benefit from greater exposure to the paradigms of traditional legal education."¹⁸ Alas, our students come to CUNY having been immersed in those paradigms—which prevail not just in traditional legal education but throughout the institutions of this society—to such an extent that it is very hard even to begin to work together differently. I see no need to reinforce a paradigm which maintains that legal analytical skills are best acquired in the classroom¹⁹ or that there are "insignificant cases"²⁰ or (my favorite) that CUNY is tantamount to a "trade school."²¹ Perhaps if all us at CUNY had less to unlearn, we would have more time to get on with the huge agenda of what the good lawyer needs to learn.

So what happens to the Fool? Lear's Fool helped bring his beloved king to temporary refuge, and then disappeared from the scene powerless to prevent further pain. Very little to show for his loyalty. Anguish and exile the price of his love. Not a happy ending.

I got a call today from one of our graduates, one who got the job she thought she wanted more than anything in the world, the job I had fifteen years ago, with Legal Aid. She was assigned to a very difficult case, one that presents enormous legal and ethical and practical and tactical complexity. You might call it an insignificant case — the defendant, a person with AIDS among other problems, is a petty criminal, although he faces a lot of time on a drug charge. My former stu-

18. *Id.* at 34.

19. *Id.* at 55. The passivity of the average law student in the average law school classroom is legendary, exceeded only, in the upper years, by the sheer absence of students, who find jobs and job interviews and clinical work activity less wasteful of their time. Our students develop and refine their analytical skills as lawyers do, by actively doing lawyering work.

20. *Id.* at 33. What, do you suppose, is an "insignificant" case? One that didn't matter too much to the parties? One decided by an insignificant judge? One involving insignificant people? The attitude belied by that casual term is precisely one of the paradigms we are struggling against.

21. *Id.* at 34. This term's origins in British aristocracy's disdain for those who made their money the old-fashioned way, by earning it, as John Houseman puts it for Smith Barney or Dreyfus or whatever (isn't the metamorphosis of his acting persona from redoubtable law faculty member to spokesperson for the most efficient accumulation of private wealth a fitting progression?), does not exactly recommend it as a useful tool of pedagogical discourse.

dent's supervisors, and many of her co-workers at Legal Aid, are urging her to get off the case, to ask to be relieved, to give up already on this useless piece of scum. We talked for about two hours about what it is to be a lawyer, and about what she *wants* to do, which is to stay with the case and try to help her client, in spite of his constant rejection of her assistance and frequent abuse. At the end she said, simply, "I'm so glad I went to CUNY." I said, "Me too." Then she said (and I am not making this up), "My supervisors say I am a fool." I said "You are — thank God, you are."

Who Needs Information When You're Working Underground? Legal Education, Social Context, and the Public Interest¹

Anthony Chase *

There is a growing academic as well as popular literature on the developing program for lawyer training at City University of New York Law School at Queens (CUNY)² and the Barnes/Kleinberg essay, "Outside Perspectives,"³ seems to me to make, on balance, a useful contribution to that literature. In the brief comments which follow, however, I intend to show that "Outside Perspectives" misconceives the extent to which CUNY derives support from other presumed "alternative forces" within American legal education (i.e., CUNY turns out to be more unique than Barnes/Kleinberg suppose) as well as overestimates the residual quality of orthodox U.S. lawyer training techniques. Barnes/ Kleinberg thus tend to share in what I regard as a nearly universal *underestimation* of the importance to American legal culture of the pioneering developments at CUNY. Before arriving at my critique of Barnes/Kleinberg, however, I would like to quickly review the role played by public opinion and the public interest in development of American professional systems of ethics and self-regulation and, then, briefly locate the relation between the public interest within professional regulation, on the one hand, and emphasis on social context within professional education, on the other.

If we look first to the standard treatment of the role of public ser-

* Professor of Law, Nova Law Center.

1. Title borrowed from R. Waters, *Who Needs Information*, RADIO KAOS (Copyright, CBS Records 1987).

2. For the academic literature, see Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549 (1986); Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986); Khosla & Williams, *Economies of Mind: A Collaborative Reflection*, 10 NOVA L.J. 619 (1986); Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633 (1986); Chase, *American Legal Education Since 1885: The Case of the Missing Modern*, 30 N.Y.L. SCH. L. REV. 519 (1985).

3. Kleinberg and Barnes, *CUNY Law School: Outside Perspectives and Reflections*, 12 NOVA L. REV. 1 (1987).

vice within the basic definitional structure of professionalism, we are struck by the degree to which *serving the public interest* has long qualified as a significant — perhaps, *the* significant — justificatory principle for professional autonomy and relative independence from public regulation enjoyed by American professional associations, by organized groups of producers of professional services.⁴ Harvard Law School Dean, Roscoe Pound,⁵ went so far as to suggest:

There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.⁶

To be sure, Pound's observation would need to be amended today with respect to gender identification ("[t]he term refers to a group of men or women," we would say) but with regard to the central role of public service, even to the point of rendering lawyer incomes as *incidental* relative to service on behalf of the public good, nothing should be changed since lawyers (and many other professionals) are no less free from public regulation today than in Pound's day and, critically, no new justificatory principle has been generated by the legal profession for its autonomy beyond the standard, loyal devotion to public needs conception.

The great sociologist, Emile Durkheim,⁷ paralleled Pound's sharp division between the status of public interest within professional, as opposed to mere business or trade, conduct when he wrote that business people are without the kind of association or formal orders within

4. For analysis of professionals generally, and lawyers in particular, as "producers of professional services," see M. S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); Abel, *Toward a Political Economy of Lawyers*, 1981 Wis. L. REV. 1117.

5. For overviews of Pound's tenure as Dean of the Harvard Law School, see J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* (1978); A. E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967* (1967).

6. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

7. For a brief but insightful introduction to Durkheim, see A. GIDDENS, *EMILE DURKHEIM* (1979).

which morality can be enforced. "Now," suggested Durkheim,⁸ "this lack of organization in the business professions has one consequence of the greatest moment: that is, that in this whole sphere of social life, no professional ethics exist." Just as Pound contrasted the pursuit of profit within business, where it is all, and within the professions, where it is incidental, Durkheim contrasted the realm of business, where no professional ethics exist, with the real of formal professional associations, such as those of lawyers, where professional ethics, Durkheim insists,

cannot be of deep concern to the common consciousness precisely because they are not common to all members of the society and because, to put it another way, they are rather outside the common consciousness. It is exactly because they govern functions not performed by everyone, that not everyone is able to have a sense of what these functions are, of what they ought to be, or of what special relations should exist between the individuals concerned with applying them. All this escapes public opinion in a greater or lesser degree or is at least partly outside its immediate sphere of action.⁹

Thus Durkheim provides a prescription for professional autonomy from public interference which would cause even a bar association president (or chair of a bar ethics committee) to blush — but which remains, at the same time, inseparable from Durkheim's recognition of an exclusive professional fidelity to public service, inseparable from his sharp juxtaposition of professional indifference to profit with business preoccupation with making money. Bringing us into an understanding of professionalism from the perspective of the 1950s, and making an appropriate correction for gender identification, Peter Wright argues:

Finally, there is the touchstone of the true profession and the truly professional life. There must be a measure of unselfishness or freedom from purely personal considerations. For a calling to be a true profession, it must have an unselfishness [sic] aspect of public service. For persons to be professional men and women they must be governed by moving considerations other than those of personal advantage. . . . Unselfish effort in the interests of our fellow men is found in every corner of life. When it is practiced by a group as a feature of their life in common, it is the highest claim to profes-

8. Course Materials for a Seminar in the Legal Profession, Harvard Law School 36, 42 (taught by Prof. Morton Horwitz, Harvard Law School, 1978-79), quoting E. DURKHEIM, PROFESSIONAL ETHICS AND CIVIL MORALS (1954).

9. *Id.* at 39.

sional status.¹⁰

This standard treatment of the role of public service within the basic definitional structure of professionalism, illustrated here by reference to Pound, Durkheim, and Wright, was replaced — or at least challenged — by an alternative treatment or conceptualization of the issue in the period following the 1950s. Eliot Freidson, one of the most important sociologists of the professions in the United States, recently described the transition from standard treatment to contemporary alternative notions about the relation between professions and public interest in the following terms:

[T]he general tenor of [standard] analyses has represented professions as honored servants of public need, occupations especially distinguished from others by their orientation to serving the needs of the public through the schooled application of their unusually esoteric and complex knowledge and skill. In the 1960s, however, a shift in both emphasis and interest developed. . . . The mood shifted from one of approval to one of disapproval, from one that emphasized virtue over failings to one that emphasized failings over virtue. The very idea of profession was attacked, implying if not often stating, that the world would be better off without professions. Furthermore, the substantive preoccupation of the literature changed.¹¹

Freidson goes on to argue that this alternative treatment of professionalism gives substantive focus to the political and economic role of professions in society and, with special significance for the core issue before us, the newer, more skeptical, treatment of professionalism tends to regard the ethical claims made in behalf of professional conduct — particularly, the devotion to public service — as less objective justification for professional autonomy than ideological prop to monopoly privilege. "Writers from the late 1960s on," observes Freidson, "emphasized instead the unusually effective, monopolistic institutions of professions and their high status, as the critical factor and treated knowledge, skill, and ethical orientations not as objective characteristics but rather as ideology, as claims by spokesmen for professions seeking to gain or to

10. READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 9, 12 (D. Nolan, ed. 1980), quoting Wright, *What is a Profession?*, 29 CAN. B. REV. 748 (1951).

11. E. FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 28 (1986).

preserve status and privilege."¹²

Now, at one level, the differences between the standard and alternative treatments of professional structures in the U.S. — the distinction, in particular, between professional commitment to public need as objective characteristic or mere ideology — are quite complex and require a sophisticated evaluation of contemporary analyses of professional ideologies and their purposively-manufactured pictures of social reality.¹³ Although Freidson expresses a certain skepticism of theories dependent upon concepts like "hegemony, domination or monopoly of discourse,"¹⁴ he does not provide a detailed or exhaustive critique of the distinction between objective justification and ideology in the reproduction of professional independence in American society. For our purposes here, what seems to me critical so far as the distinction between standard and alternative treatment goes is rather simple: The transition from objective characteristic to ideology analysis generally reflects a *reevaluation of whether the public has been getting a fair return on its investment in professional autonomy from public regulation*. Perhaps this is basically Freidson's point where he suggests that the scholarly "mood shifted from one of approval to one of disapproval, from one that emphasized virtue over failings to one that emphasized failings over virtues."¹⁵

Thus we now confront a situation where the professions generally, and lawyers in particular, are faced with a possible renegotiation of their social contract with the public — that is, a revision of the particular balance between performance of public service in exchange for freedom from public regulation. How this renegotiation will come out, over what period of time, and on whose terms are problematic issues. For those in the legal profession who cherish complete professional autonomy, there is not yet reason for panic. For those (in and out of the professions) who would like to see either much more vigorous public oversight of professional conduct *or* much more substantial, *demon-*

12. *Id.* at 29.

13. See LARSON, *supra* note 4; Abel, *supra* note 4; Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, A.B.F. RES. J. 1; Abel, *The Transformation of the American Legal Profession*, 20 L. & SOC. REV. 7 (1986); G. GEISON, *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* (1983); J. G. MERQUIOR, *THE VEIL AND THE MASK: ESSAYS ON CULTURE AND IDEOLOGY* (1979); R. HYMAN & R. PRICE, *THE NEW WORKING CLASS? WHITE-COLLAR WORKERS AND THEIR ORGANIZATIONS: A READER* (1983); M. OPPENHEIMER, *WHITE COLLAR POLITICS* (1985).

14. FREIDSON, *supra* note 11, at 230.

15. *Id.* at 28.

strated commitment to public need on the part of professionals, it is too soon to sense victory. But the point of renegotiation itself appears to have been reached.

This is not to suggest that public criticism of professional behavior in the present period is entirely new. Public antipathy to lawyers,¹⁶ as well as scholarly criticism of the professions,¹⁷ have long traditions. As Freidson indicates:

There is no evidence that the prestige of medicine, law, school-teaching, or the ministry has changed in relation to other occupations. Similarly, a recent collection of public opinion surveys between 1966 and 1981 shows that confidence in such professions as medicine, education, and science has indeed declined, but not in relation to confidence in other American occupations and institutions.¹⁸

Nevertheless, several points need to be appended to this comment. First, if we are evaluating the status of the existing "contract" between society and its professions, the fact that *the professions* have declined in terms of public confidence may have real significance for revision of the contract, even if other "occupations and institutions" have also declined during the same period (perhaps their, quite different, relations with society will also be revised).

Second, there is an autonomous or contingent factor which must be considered — specifically, the likelihood of and means by which declines in public confidence in the professions can actually be translated into revised terms within the social contract in actual political and social settings. A large change in public confidence might mean little in relation to renegotiating the nature of professional independence in America if there is no way in which public opinion can be translated into social regulation. On this issue, Freidson himself seems to offer an

¹⁶ See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY*, 1776-1876 (1976); J. W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); W. SEAGLE, *THE QUEST FOR LAW* (1941).

¹⁷ While acknowledging the generally laudatory tenor of the standard analysts' critique of professionalism, Freidson adds that "[t]his is not to say that they . . . were mere apologists for the professions. In the writings of virtually all of them we can find overt recognition and criticism of deficiencies in the performance of professions and most particularly of the degree to which economic self-interest rather than the common good can motivate the activities of professionals and their associations." FREIDSON, *supra* note 11, at 28.

¹⁸ *Id.* at 112.

instructive observation:

A considerable amount of power can be generated in the United States by public opinion, mobilized and focused by the mass media and culminating in political actions that can markedly constrain the degree and manner in which practitioners and their administrators can control professional work and their clients in the United States. Not all professions are equally vulnerable to the pressure of public opinion because not all professions' work excites the same amount of interest.¹⁹

Even a superficial analysis of American popular culture reveals that the work of the legal profession excites more public interest than perhaps that of any other profession.²⁰ Furthermore, Freidson adds, "[t]hus organized lay groups mobilizing public opinion through the mass media can be seen to be an important factor in influencing the type and substance of power that professions may exercise in the United States. They are especially important for professions that characteristically provide personal services to broad segments of the public."²¹ Lawyers are preeminent providers of personal services to broad segments of the public, at least outside of what Freidson calls the "corporate service sectors of law and accounting."²²

Third, the specific empirical research cited by Freidson only covers public opinion up to 1981; it is at least possible that a broad range of conjunctural features since then have contributed to a greater desire within the public to revise the relation between lawyers and public regulation, especially in controversial areas of ethical conduct and provision of services to the public.²³ The bottom line is that we are going

19. *Id.* at 219.

20. See Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 Am. B. Found. Res. J. 281; Chase, *Toward a Legal Theory of Popular Culture*, 1986 Wis. L. Rev. 527; Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987); Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 L. & Soc. Rev. 185 (1987).

21. FREIDSON, *supra* note 11, at 219-20.

22. *Id.* at 220.

23. See, e.g., Galanter, *The Legal Malaise: Or, Justice Observed*, 19 L. & Soc. Rev. 537 (1985); Cf., Casson, *Once Upon a Time There Were No Lawyers*, 18 SMITHSONIAN 122 (Oct. 1987) "'The Devil makes his Christmas pie of lawyers' tongues,' runs an old saying. And down through the ages opinion has run pretty much that way. Yet today, more than ever after the recent Iran-Contra hearings, life without lawyers

through a period during which the legal profession and its training institutions should be extremely attentive to public views of professional practice and during which the fundamental and historic *quid pro quo* between lawyers and society — the mutual consideration which has in theory guaranteed lawyers great independence and the privilege of self-regulation in exchange for satisfaction of the public's legal needs, independent of cost — may well be on the verge of dramatic reformulation.

What, precisely, should be the role of legal education during this contentious period? The single most important service which the law schools can provide the profession is that they can insure that law students receive detailed and accurate *information* regarding the fundamental terms of the contract with society — specifically, concrete details regarding the performance of law and lawyers in serving the public interest within the American context. It is impossible for law students to gauge, even remotely, whether the terms of their relation to society will or should be redrafted, whether the legal profession has or has not lived up to its part of the bargain insuring the privilege of lawyer self-regulation, without studying the way that law and lawyers have affected the American public. It is insufficient for law students to translate the facts of appellate cases, the decisions of lawyers and judges, into abstract formulations designated A and B, or Blackacre and Whiteacre, and into hypothetical solutions to imaginary problems. Law students must study the actual impact of the real legal system in America on real Americans. It would seem to me that this kind of systematic training in law can be done both in and outside the classroom — in both clinical education contexts and in classroom lecture and discussion — but what must be present at all times is the reality of an existing, nameable, social world. This is the world within which real people live and work and which real law students need to learn about if they are to have any notion of how to actually function as lawyers, let alone make judicious decisions about how their role in society should shape the agreed relation between their profession and their community.²⁴

seems inconceivable. They are ubiquitous — dominating courtrooms, coaching clients inside committee chambers and shielding them outside, starring in plays, movies and television series. Lawyers, you would think, must belong to at least the world's second oldest profession."

24. I will provide one specific, concrete example here of how this imperative can be realized in a first-year law school classroom. Most instructors, certainly most Contracts teachers, will be familiar with the "Walker-Thomas Furniture Co. cases" involving the operation of a retail furniture store utilizing installment contracts in its com-

We are now positioned to consider the role of a specific law school,

mercial relations with its customers, generally residents of a ghetto section of the District of Columbia. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (1965); *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (1971). The "Willistonian" or classically oriented Contracts teacher will likely communicate directly or indirectly to students that the dissent in *Williams* and the decision for the court in *Patterson* are "right"; that is, courts should not intervene within private commercial relations for the purpose of remaking "unconscionable" contracts. (Can you tell the difference between Skelly Wright's notion of "unconscionable" contracts and "commercially unreasonable" ones? Is there any? How can businessmen know in advance whether their commercial dealings will be legally valid? Etc.). On the other hand, the "Corbinists as" or more liberal Contracts teacher will likely communicate directly or indirectly to students that the view of Skelly Wright is "correct"; that is, courts have an *obligation* to intervene where their failure to do so would permit gross inequality of bargaining power or an absence of meaningful choice to become decisive in commercial relations. It is in the interest of business itself, as well as victimized consumers, for courts to police potentially outrageous installment contracts, etc.

Rather than favor either the classical or liberal solution to this problem, the Critical Legal Scholar is likely to press the students forward until, in complete frustration, they discover the inevitable "indeterminacy" of the legal and policy arguments advanced in the *Walker-Thomas* cases, the infinitely manipulable quality of legal language out of which the "rules" of Contract law are necessarily constructed, and conclude the inquiry precisely at the point where students ruefully accept that law is devoid of logic and the Age of Reason has apparently collapsed at the feet of an Era of Demystification or Deconstruction.

All these approaches make sense in relation to the history of law teaching over the last century, all arrive at solutions which "fit" within the framework the law professors have created for them, and all are hallucinatory with respect to the real events of the *Walker-Thomas* cases, the real legal practice problems presented to actual lawyers representing these clients, the real world of money, politics, race and social fact. The Critical Legal Scholars may be right that language is infinitely manipulable but reality (ask any practicing attorney) is not. The life situations of the customers of *Walker-Thomas* are not "indeterminate" — their life situations are specifically determined by analyzable networks of power.

At the point where the Critical Legal Scholar stops, I assign the students this reading: David I. Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, NO ACCESS TO LAW 379, (L. Nader, ed. 1980). The next day the students come to class in *shock*. One essay has provided them not only with sufficient concrete *information* about the actual social reality of the *Walker-Thomas* cases for them to realize it probably does not make much difference to the plaintiffs *which* rule the court adopts or what the court's reasoning is but, more devastating, they have enough information to realize that their casebooks may well be almost fictional accounts which completely omit the kind of analysis which a lawyer must have, which a law student must have if she is going to learn (in school) what a lawyer does for a living.

"[T]o most Walker-Thomas customers," according to Greenberg, "the requirements applicable to monthly payments or repossession of goods are what the salespe-

CUNY, in this general scheme of things, and to consider the critique of CUNY by Barnes/Kleinberg.²⁵ The key ingredient in the critique of CUNY, or any lawyer training program, must be scrutiny of a law school's commitment to providing students with concrete information about the way the legal system and the legal profession actually work in a specific social setting. With public service and commitment to public need constituting the justification for professional independence from state regulation, social context (the terrain within which lawyers perform their part of the social contract) becomes crucial to legal education and the focal point for generation of that requisite of quality professional training: personal responsibility.²⁶

Barnes/Kleinberg begin their inquiry with this comment:

Under the influence of legal realism and its modern variants in linguistic and psychoanalytic analyses of law, critical legal studies, and social science approaches to law, significant departures from Langdell's model curriculum have become common. . . .²⁷

ople say they are, not necessarily what the District of Columbia laws state. Similarly, for many members of this community, the city's responsibilities for trash pick-up seem to proceed from the largesse of officials in the Department of Environmental Services rather than from the department's governing regulations. The informality is double-edged: though the organizations in this study provide flexibility, they can also camouflage illegal coercive tactics and distort clients' notions of what they deserve or should expect. Which informal element comes into play — the 'relevant' or the illegal — depends largely on the organizations' own institutional needs. Each group has its peculiar strains and pressures: inadequate resources, lack of power over marketplace or political forces, or the need to appear legitimate in the eyes of the community and law enforcement agencies." Greenberg, *id.* at 379-80.

It is within this network of legal, illegal, and alegal forces and events which lawyers become situated and have a job to do. And knowing how to argue for the classical or liberal doctrinal solution to some law school case is not sufficient to do that job well. Knowing how to endlessly confront principles with counter-principles seems a kind of adolescent, school-boy's preoccupation in the face of the enormous demands of professional practice in law and it is hard to believe law schools can ever do the job required of them until they abandon this debilitating dependence upon teaching from appellate cases. For just two interesting investigations of aspects of first-year law school, case method teaching in relation to human and social reality, see J. T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976); Gordon, *Book Review* (reviewing G. GILMORE, *THE DEATH OF CONTRACT* (1974)), 1974 *Wis. L. Rev.* 1216.

25. Kleinberg and Barnes, *supra* note 3.

26. See E. DVORKIN, J. HIMMELSTEIN & H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981).

27. Kleinberg and Barnes, *supra* note 3, at 1.

On balance, this seems to me an inaccurate assertion. It is, indeed, correct to suggest that legal realism²⁸ proposed a quite dramatic alternative conception of how law schools could function — alternative, that is, to the Harvard model of legal education which was being copied nationally as legal realism began to come into its own.²⁹ But realism's blueprint for radical change was just that: a blueprint for an institution never brought to life, a plan which was never carried out in reality. Interesting as the legal realist critique of legal education may have been, it is *generally recognized* to have failed to even remotely reorganize the professional education of American attorneys.³⁰ It has not inspired or guided common and significant departure from the Harvard (or Langdell) model.

It is not easy to be sure what "Outside Perspectives" includes within the notion of "linguistic and psychoanalytic analyses of law";³¹ rigorous psychoanalytic analyses of law are, of course, notoriously absent from American legal scholarship.³² I think that the most significant impact, however, of linguistic or language-theory approaches to the analysis of law has, unmistakably, developed under the banner of "deconstruction in law" or, what is the same thing and is named by Barnes/Kleinberg in their next breath, critical legal studies.³³ Thus I think linguistic, deconstructionist, and critical approaches to legal analysis can be usefully considered together, especially in terms of their relation to legal education and the specific development of law schools during the current period.³⁴

In a way, of course, critical legal studies (like the earlier legal realist movement) has helped set (or at least reflect) what I regard as an essential precondition for the development of relevant, modern law schools — laboratories like CUNY. Stated in the most basic way, both

28. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

29. See R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983).

30. See Chase, *supra* note 2, at 537 n. 66.

31. Kleinberg and Barnes, *supra* note 3, at 1.

32. But see A. A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1971); Ehrenzweig's masterful inquiry has failed to generate a formidable psychoanalytic following within American legal scholarship.

33. Kleinberg and Barnes, *supra* note 3, at 1.

34. See Husson, *Expanding the Legal Vocabulary: The Challenge Posed by Deconstruction and Defense of Law*, 95 YALE L.J. 969 (1986); Malkan, "Against Theory," *Pragmatism and Deconstruction*, 71 TELOS 129 (Spring 1987); Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28 (July/August, 1987).

legal realism and (later) critical legal studies have indicated that it is inadequate to regard law as a process through which abstract rules are applied to concrete facts in an automatic fashion producing predictable and uncontested results. On the contrary, the work of lawyers, judges, legislators and other legal workers is dynamic, not static, and hardly replicates a machine process mechanically determining social and political issues outside of a more complex human context. This insight at least points some law professors and administrators in the direction of developing a law school organized around the *interrelation* of law and context and a legal education premised on an acknowledgment that legal reasoning is not the lawyer's equivalent of Euclidian mathematic formulation.³⁵

Having said this, it is necessary to recall the fact that legal realism did not turn American legal education upside down³⁶ and we must inquire further as to the *actual* (not imagined) impact of critical legal studies on lawyer training. The fact is, on close inspection, critical legal studies turns out to have more in common with Langdellian orthodoxy than one might expect. Specifically, critical components of Langdellian legal study (focus on appellate cases, dependence on doctrinal analysis, and treatment of law outside of social context with indifference to social theory) have become the cardinal tenets of critical legal studies.³⁷

With special reference to the politics of professionalism and the relation of legal education to training for public service, while the

35. See Chase, *supra* note 2, at 531-534.

36. See *supra* note 30 and accompanying text.

37. See Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUCATION 563, 571 (1984) ("Ideologies provide meaning for the lives people live [according to critical legal studies]; they are the pillars that buttress social structure and hold society in place. A cynic might point out that this approach has the virtue of legitimating, not the legal system, not capitalism or socialism, but the practice of sitting in a law library reading appellate cases and legal treatises."); Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 512 (1986) ("The renunciation of the theoretical dimension of the initial project of CLS [critical legal studies] helps explain an otherwise curious characteristic of recent critical legal scholarship. Although it devotes a great deal of attention to phenomena that occurred in the past, much of the work is relentlessly ahistorical. It focuses synchronically on particular moments in the past or offers a sort of comparative statics, but never gives a diachronic account of transformation over time. I believe that this ahistoricism is linked to the critique of social theory, because diachronic accounts explicitly or implicitly rely on social theory to give them coherence. . . . Having renounced social theory, CLS is barred/precluded from using these standard traditions of historical writing — thus its characteristic ahistoricism.") (emphasis added).

CUNY law school has featured an openly stated commitment to reaching out to the community (through both clinical and classroom programs) and to perceiving the politics of professionalism as including the central *social questions* animating American political debate (one of which concerns the renegotiation of several social contracts — including those of the professions!), critical legal studies has turned away from society, away from the community outside the brick walls of academe and has turned narcissistically inward toward self-contemplation, trying to get deeper and deeper into the internal critique of doctrine while abandoning the social sciences. In short, critical legal studies has come to represent for most American law students a specific form of that generally incapacitating Harvard model, so well described by Ralph Nader as a system of lawyer training that “trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage. . . .”³⁸ — the intellectual cage of deconstruction in the case of critical legal studies.³⁹ Of course, with the neoconservative political background of deconstruction, it should have been relatively easy to anticipate the way such an intellectual strategy would simply *reproduce* the orthodox hostility of the Harvard model toward situating law in its proper social context. Indeed, in retrospect, critical legal studies seems to have been simply a *containment policy* which drew off possible opposition to the Harvard model and then channelled it into one more self-contained, introspective, apolitical species of doctrinalism.⁴⁰ Such a strategy spells the end of the law professor as “public

38. Nader, *Law Schools and Law Firms*, THE NEW REPUBLIC Oct. 11, 1969, at 20, quoted in Nolan, ed., *supra* note 10, at 236-37.

39. See Husson, *supra* note 34 (identifying critical legal studies with deconstruction in law); Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89, 153 (1986) (explaining “why the CLS scholars have adopted the post-structuralist theories of Jacques Derrida, Michel Foucault, and Roland Barthes. . . .”) For a description of the post-structuralist theories of Derrida, et. al., as an intellectual cage or worse, see generally, J. G. MERQUIOR, FROM PRAGUE TO PARIS: A CRITIQUE OF STRUCTURALIST AND POST-STRUCTURALIST THOUGHT (1986); P. ANDERSON, IN THE TRACKS OF HISTORICAL MATERIALISM (1983); Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, 146 NEW LEFT REV. 53 (1984); Corradi, D’Amico & Piccone, *Introduction to Squaring the Hexagon*, 67 TELOS 3 (1986).

40. See Sullivan, *Critical Legal Scholar Outlines CLS Movement*, HARVARD LAW RECORD 4, 4, Nov. 15, 1985 (“According to [Harvard Law Professor Gerald] Frug, if CLS was to embody a movement of any sort it would be academic, not political. A ‘CLS position’ on any given political issue can’t exist because scholars who perform critical analyses have a wide range of views. Frug sees no necessary connection between the use of intellectual methodologies such as structuralism and any particular

intellectual" — as relevant to the general range and scope of social debate in the surrounding world, outside the cloistered law school yard or quadrangle. "What's interesting in this talk about public intellectuals is that there *have been* public intellectuals in the last ten years — they have all been on the Right,"⁴¹ observes Fred Siegel in a recent *Telos* roundtable on intellectuals and the academy. In fact, precisely this situation prevails in the law school, in the system of lawyer training. It has been the Law and Economics professors who have been most prominent in the last few years in trying to remove the study of law from the doctrinal rut, escape the fixation on language games and the endless confrontation between principle and counter-principle, and shift legal education into a broader perspective which begins to raise questions about the *social consequences* of choosing one rule over another rule.

To be sure, the breadth of perspective brought to the fore by a crabbed model of economic efficiency may not make much of an improvement over the orthodox mood of social indifference or even hostility to social theory. But it points in the right direction. Critical legal studies, on the other hand, points in the wrong direction: back into the coils of an endless process of demystification of language.⁴² The critical legal abandonment of social theory marks the end of possible contributions critical legal studies might make to a turning *outward* of legal education, a turning toward social context and social history and away from dependence upon casebooks, a turning toward law in the world system of nations — toward what might be called (paraphrasing the Catholic Bishops)⁴³ "the option for social reality." Driving the nail into

political stance. Although he acknowledged that those currently performing critical legal analyses tend to be somewhere 'on the left,' he believes this will change. He analogized CLS to the Legal Realist Movement. In the past, Legal Realists have been New Deal liberals, whereas today the 'biggest' Legal Realists are in the conservative Reagan Justice Department." Reidinger, *Civil War in the Ivy*, A.B.A.J. Nov. 1, 1986, at 64 ("[I]t is not at all clear that CLS has a leftist, or any other, political bias. 'It's an oppositional movement,' says [Georgetown Law Professor Mark] Tushnet. 'Given the present state of American politics it must be on the left. But there's very little inherently leftist about it. If there were a CLS utopia there would be a CLS critique of it.'").

41. Fred Siegel in Luke, Piccone, Siegel, and Taves, *Roundtable on Intellectuals and the Academy*, 71 *TELOS* 5, 24 (Spring, 1987) (emphasis added).

42. See C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 81 (1982).

43. See National Conference of Catholic Bishops, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* 45 (1986); see also Stormes, *Common Ground: Bishops' Letter on Economy Deserves*

the coffin, Fred Siegel added in his *Telos* roundtable comments that "in an article I read on Critical Legal Studies, instead of talking about the long march through society, meaning the courts, this fellow argued that the crucial institution in which Critical Legal Studies must fight out its battle is the law school."⁴⁴ For the critical legal (literary?) scholar who rejects social theory and for whom the social world has disappeared, law is interesting only as a "text" to be "deconstructed" and an authoritative unreality matched only by Langdellianism itself is thus established. Everything closes back in on the self and the subject of law school discourse can only be . . . the law school.⁴⁵

Observing the lack of influence of legal realism on subsequent lawyer training and curriculum organization, and acknowledging the essentially conservative impact of critical deconstruction, we may now see how truly thin are the supposed common, anti-Langdellian innovations cited by Barnes/Kleinberg.⁴⁶ In an instructive footnote to their claims for real change in American legal education, Barnes/Kleinberg suggest: "For a discussion of the influence of these intellectual movements on the modern law school curriculum, see Woodard, *The Limits of Legal Realism: An Historical Perspective* . . . and R. Stevens, *Law School: Legal Education in America From the 1850s to the 1980s*. . . ."⁴⁷ What makes this note so "instructive" is that it is hard to imagine two authorities less helpful to the "Outside Perspectives" claim that there have been common and significant departures from orthodoxy in American legal education, via the legal realists or anyone else. As Stevens clearly states: "The developments of the 1920s, although likened by Harold Laski to Langdell's innovations in degree of importance, were not to be nearly as pervasive as the Harvard develop-

Support, DOLLARS AND SENSE 13 (Sept. 1987); Final Document of the Third General Conference of the Latin American Episcopate (Puebla, Mexico: Jan. 27-Feb. 13, 1979); PUEBLA AND BEYOND (J. Eagleson & P. Scharper, eds. 1979); Currier, *Liberation Theology and Marxist Economics*, 38 MONTHLY REV. 24 (Jan. 1987).

44. Siegel, *supra* note 41, at 25.

45. Within Critical Legal Studies, the phrase "local critique" or "local criticism" is given special meaning. It *does not* mean the systematic examination of the way local power structures in Cambridge or Palo Alto or West Los Angeles or the District of Columbia exist in relation to national power structures — but, rather, it means "classroom political-economy" or some equivalent form of politics which elevates to the highest level of importance the immediate institutional context within which an individual finds him or herself. Emphasis on personal responsibility thus runs the risk of producing an artificial sociology of power.

46. Kleinberg and Barnes, *supra* note 3.

47. *Id.* at 1 n.1.

ments of the 1870s had been. Moreover, the late 1930s saw disillusionment and corresponding loss of initiative at schools that had been at the forefront of the earlier efforts."⁴⁸ Stevens concludes that, perhaps like the New Deal, legal realism's curriculum reforms simply ran out of steam.⁴⁹

Listen to Woodard's verdict on this score: "I conclude that though we have more or less thoroughly rejected the philosophy of the case method, like Maitland's forms of action, it still rules us from the grave."⁵⁰ Stanford Law Professor Thomas Grey adds: "Heedless of this power of categories, modern legal theorists have not supplanted the classical ordering but have left it to half-survive in the back of lawyers' minds and *the front of the law school curriculum*, where it can shape our thinking through its unspoken judgments — Langdell's secret triumph."⁵¹ Thus heedless of the power of categories, modern legal commentators have failed to perceive that the classical ordering *has not* been significantly or commonly abandoned. The issue, of course, is not retention of the *socratic* method (as "Outside Perspectives" implies) but the *case* method and the classical ordering which it rationalizes. Barnes/Kleinberg appear to miss this point.⁵²

More significantly, their reliance on the imaginary pluralism of contemporary American legal education, their *overestimation* of the extent to which the classical Langdellian or Harvard model has been actually altered, causes them to *underestimate* the singular quality and importance of the "experiment" at Queens. The "mind set" characterizing the Barnes/Kleinberg approach to CUNY looks something like this: CUNY has initiated some interesting models for reform but there is, at the same time, a great deal of interesting experimentation and institutionalization of reform in legal education today. Thus we must gradually integrate what is useful at CUNY into already institutionalized reforms and reject what fails at CUNY. We must not allow enthusiasm for radical change to blind us to the utility of much of the classical or Langdellian tradition.

Consider the conclusion to "Outside Perspectives" where the au-

48. R. STEVENS, *supra* note 29, at 163.

49. *Id.*

50. Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 728 (1968).

51. Gray, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 50 (1983) (*emphasis added*).

52. Kleinberg and Barnes, *supra* note 3.

thors report:

The major complaint we heard about legal education at CUNY is that students are not provided with sufficient legal doctrine or theory. Because the courses are tied to the simulations and traditional legal categories are rejected, students complained that they read insignificant cases and that their education does not expose them to the "overall picture." In addition, in classes and in simulations, close analysis of judicial decisions often is replaced by general overviews that seem superficial.⁵³

A "second opinion," another "outside perspective," might conclude that this report was perfectly accurate or rather questionable. My point is that if you listen to it carefully, you can hear the notes and chords of the classical fugue escaping from the Barnes/Kleinberg orchestration of what they have seen, irrespective of how accurate their report. In a Langdellian world, there is no way that law student attention can be diverted from an exclusive focus upon legal doctrine without risking the charge that insufficient attention is being paid to critical appellate cases. Residual insecurity over abandoning doctrinal exclusivity is inevitable, at least for the legal theorist wedded to a classical foundation. Right or wrong, you cannot satisfy this insecurity while developing a law school which fits into the twentieth century.

Students complained, according to "Outside Perspectives," that they "read insignificant cases."⁵⁴ And they *should* read insignificant cases — at least cases regarded as "insignificant" within the classical paradigm — if they are to receive a legal education oriented toward the modern, as opposed to classical worldview, since which cases count most change from watershed period to period.⁵⁵ The students also complained, according to Barnes/Kleinberg that they were inadequately exposed to the "overall picture" at CUNY. But it is inescapable that they would feel this, comparing their experience with other New York-area law students, trained in the classical mode, since the "overall picture" of the world and the place of lawyers within it *changed* between the end of the nineteenth century (when the classical, if current, worldview for law students was generated) and the end of *our* century. Finally, Barnes/Kleinberg assert that CUNY law students were subjected to an education where "close analysis of judicial decisions often

53. Kleinberg and Barnes, *supra* note 3, at 33.

54. *Id.*

55. See Chase, *supra* note 2, at 527-29.

is replaced by general overviews that seem superficial."⁵⁶ Comparatively speaking, the general overviews of possible diagnosis and (hoped for) cure in contemporary medicine likewise seem "superficial" compared with the "close analysis" of diseased patients and their symptoms in the latter nineteenth century — the world of medical diagnosis which *preceded* that of the great revolution relocating medical diagnosis (and medical education) in chemistry, pathology, bacteriology, physiology, and physics.⁵⁷ Of course, modern medical education would seem "superficial" to someone who believed that human malady could be explained with reference to a theory of the "humors"; likewise modern (social science and clinically-based) legal education would seem "superficial" to anyone who believes that legal outcomes can be explained with reference to a theory of mechanical rule application and case study (or rather, *casebook* study, since there is little similarity between real legal cases — from pre-trial through final adjudication — and the "tip of the iceberg version" which students get in their casebooks).⁵⁸

In conclusion, Barnes/Kleinberg suggest that "introducing students to themes of legal history and political theory would not require any significant departure from traditional notions of legal education."⁵⁹ It is difficult to imagine a more fanciful observation on law school reform. If legal history and political theory were substituted for Langdellian orthodoxy, and for the notion of law as logical mathematic formulation, then this would destroy classical legal education (and the West and Foundation casebook series!) once and for all. But that is not something on the agenda for reform, outlined by Barnes/Kleinberg. They assert that:

Even if legal education based on decided cases is outmoded and inefficient, one wonders whether students should not at least be acquainted with the traditional mode of organization. CUNY's graduates will, after all, be operating in a legal world where most other attorneys will have been educated that way and will conceive of legal problems according to a Langdellian model. In short, it seems to us that students at CUNY could benefit from greater exposure to the paradigms and practice of traditional legal education,

56. Kleinberg and Barnes, *supra* note 3, at 33.

57. Thomas, *What Doctors Don't Know*, THE NEW YORK REVIEW 6, Sept. 24, 1987, at 6.

58. See generally Noonan, *supra* note 24.

59. Kleinberg and Barnes, *supra* note 3, at 35.

*if only to understand why those paradigms are now inadequate.*⁶⁰

How can one help but be troubled by this argument? Not so many years ago, the pro football star, Joe Namath, appeared in a series of print advertisements for men's cologne or deodorant under the slogan: "the man who uses it, doesn't need it." Here was the ultimate in advertising insanity: The value of the product, in the end, derived from the fact *that it had no value*. What are we to make of "Outside Perspective's" equivalent argument in behalf of legal education in the Langdellian mold (and, to an extent, in opposition to the modern, CUNY approach)? The fact is that CUNY's graduates "will, after all, be operating in a legal world where most other attorneys"⁶¹ regard their own, casebook legal education as hopelessly inappropriate to the actual world of legal reality into which they entered upon graduation from school. To suggest that one generation of attorneys somehow owes it to previous generations of miseducated attorneys to have their tuition dollars poorly invested in a nineteenth century approach to lawyer training is, indeed, a sad commentary on the degree to which even presumed "reformers" cannot manage to break with the past.⁶²

But CUNY has broken with the past and that is what is important. In conclusion, we can state the following: (1) Historically, the legal profession's extraordinary freedom from public regulation in the United States has been justified (or rationalized) on the ground that public service comes before private income for practicing attorneys. (2) Today, the public seems more willing to question the degree of independence it has granted American professions, including law, and it is especially important for legal education to not only instill within students a commitment to public service but also provide concrete information on the basis of which students can determine for themselves what kind of bargain the public has gotten in return for its grant of privileges to attorneys. (3) It is not possible for law students to either understand why they should serve the public before their own interests or how well the profession of law has performed this social function by simply studying casebooks. The first-year law student cannot determine what professional responsibility to the public means by reading tort and civil procedure cases on appeal. The first-year law student cannot de-

60. *Id.* at 34.

61. *Id.* at 33-34 (*emphasis added*).

62. On breaking with the past in legal education, see Chase, *supra* note 2, at

termine whether the American public has been well-served by economic and political consequences of fundamental transformation in common law and statutory law over the last two-hundred years simply by reading statements of judges (edited statements at that!) in contract and property case reports. Whether the student reads Gilmore or Hurst or Friedman or Horwitz⁶³ (or someone else), he or she must begin from the first day of law school to put those tort, contract and property cases in their natural historical and social context in order to understand what they mean for Americans and for the relation between the American people, their law, and their lawyers. It is the transformation of the CUNY curriculum with these principles in mind — the emphasis on the public interest and upon law in context — which marks CUNY a law school of singular importance in America today. It is the difference between CUNY's reforms and the marginal tinkering cited by Barnes/Kleinberg (which they mistake for real reform) or the companion movements for change cited by Barnes/Kleinberg (which they mistake as radical rather than conservative; for example, the case of critical legal studies), which makes CUNY's present and CUNY's future so important to everyone involved with American legal culture. (4) When arguments against the project at City University's Law School get to the point of criticizing Queens for failing to effectively integrate classical methods and material — so that new law students could really see just how bad the law schools used to be — then I think we have arrived at the point where legal educators in the U.S. can stop second-guessing CUNY and start expropriating the first twentieth century law school's insights into how best to train lawyers.

At the age of twelve, I was much impressed by the nightmare vision created by Hollywood movie director George Pal in his science fiction classic, drawn from H.G. Wells, *The Time Machine* (1960). The motion picture nightmare stayed there in my unconscious until I went to law school and began to experience what it might actually be like to witness an entire civilization (in this case, the society of law and lawyer training), with all its complexity, division of labor, and hierarchy intact yet functioning *entirely underground*. Like the Morlocks,

63. See, e.g., G. GILMORE, *THE DEATH OF CONTRACT* (1974); G. GILMORE, *THE AGES OF AMERICAN LAW* (1977); J. W. HURST, *LAW AND CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); J. W. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2nd ed. 1985); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1760-1860* (1977).

subterranean for innumerable generations and unable to tolerate the daylight surface of the planet, the case method professors had gone underground generations before I got to law school, and they still found the daylight surface of the legal world — in the form of concrete information about law in society — quite unbearable. So it was banished, this information, not only from the classroom but from legal scholarship, by and large, itself.⁶⁴

The Harvard Law School, which gave birth to classical orthodoxy and took legal education firmly underground, outside the view of the public and outside the daylight of modern social science and political theory, eventually located the main subjects of legal education in buildings connected by an intricate underground of tunnels and passages. The student could go from Mr. Hart's very first day of being called on in his case method class⁶⁵ virtually through the day his law degree was granted *without ever having to go above ground and encounter that strange element called information*. Whether it is information about the legal world derived from clinical assignments in the first year or simulation experiences connected with particular courses or broad overviews of politics and the theory of the state, anthropology, economics, historical materialism or sociology and theory of law which *reconnect* cases, statutes, federal agencies, public policy, lawyers and their associations to the social world, the City University of New York has taken legal education back above ground where it belongs. The more writers on this subject are effectively able to bring out that main point, the more helpful their work will be in charting the future of American legal education.

In the meantime, most law students will remain trapped below ground, cut off from concrete analysis of concrete legal situations by doctrinalists of every camp, a kind of intellectual and moral cave in or collapse which is not the same kind of disaster one reads about in the papers. But the tragedy is there, nonetheless. On this subterranean nightmare, Wells made it clear enough that he was talking about our world, the "non-fiction world," so to speak, when he wrote:

There is a tendency to utilize underground space for the less ornamental purposes of civilization; there is the Metropolitan Railway in London, for instance, there are new electric railways, there

64. See Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

65. See J. J. OSBORN, JR., *THE PAPER CHASE* (1971).

are subways, there are underground workrooms and restaurants, and they increase and multiply. Evidently, I thought, this tendency had increased till Industry had gradually lost its birthright in the sky. I mean that it had gone deeper and deeper into larger and ever larger underground factories, spending a still-increasing amount of its time therein, till, in the end - ! Even now, does not an East-end worker live in such artificial conditions as practically to be cut off from the natural surface of the earth?⁶⁶

It is the natural surface of earthly legal practice and of the legal system in America from which attorneys have been cut off while in school and the time has come to do something about these "artificial conditions"⁶⁷ of lawyer training. The time has come to end the cycle of generation after generation of dissatisfied consumers of legal education who manifest their displeasure, occasionally, by refusing for a few years to contribute money to their law school as a part of graduation class fund-raising. But that merely expresses contempt; it does not change the curriculum or the organization of the law schools. It does not put the public interest at the center of lawyer training nor situate all course materials and methods within their natural social context. It does not make the kind of changes which must be made for lawyers to feel that law school had a purpose for them other than just providing certification for the bar exam. "Who needs information when you're working underground?" Ask the current Langdellians and their equivalent in avant-garde scholarly camps. The answer is: "Why do we have to continue working underground?" Why not bring legal education above ground and into the light — into the kind of analytic and visual clarity which even obscure legal problems achieved once Dickens drew them up out of the industrial fog of London and the other fog of Chancery.⁶⁸

66. H. G. WELLS, *THE TIME MACHINE* 75 (Berkley Book ed., 1957).

67. *Id.*

68. See C. DICKENS, *BLEAK HOUSE* (1852-53).